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CONTENTS

CURRENT TOPICS

Lord Uthwatt

To have given his name to and to have been the guiding genius in producing a monumental work such as the Report on Compensation and Betterment, and to have seen its fruition in the Town and Country Planning Act, all in the last ten years of a life of achievement—that was the destiny of Lord UTHWATT, who died at the age of seventy on 23rd April. Born in Australia, he was educated at Ballarat College, Victoria, and Balliol College, Oxford, where he obtained the B.C.L. degree. In 1904 he was called to the Bar and became Vinerian scholar. His judicial career commenced in 1941 while a member of the junior Bar, when he was appointed a judge of the Chancery Division, and he became a Lord of Appeal in Ordinary in 1946. Lord Uthwatt was a man of wide sympathies as well as profound learning. Those who came before him in court left with the conviction that his was an intellect of the highest order with the quick and sure judgment of a master of his craft. His passing is a serious loss to the Commonwealth.

Lord du Parcq

WITHIN a few days of LORD UTHWATT's death comes news of the passing of another great lawyer of our times, LORD DU PARCQ, whose death at the age of sixty-eight took place on 27th April. He was born at St. Helier, Jersey, and educated at Victoria College, Jersey, and at Exeter and Jesus Colleges, Oxford, being President of the Oxford Union in 1902. Called to the Bar in 1906, he took silk in 1926 and was appointed a judge of the King's Bench Division in 1932, an office which he held until his elevation to the Court of Appeal in 1938. In 1946 he became a Lord of Appeal in Ordinary, and in the same year was appointed Chairman of the Royal Commission on Justices of the Peace, whose report last year is still fresh in our minds. We cannot do better than echo the words of the LORD CHANCELLOR, who said of him: "Lord du Parcq was one of the greatest common law judges that it has ever been my pleasure to meet, and a man for whom the whole legal profession had a profound regard. His great human quality made him an outstanding criminal judge."

County Court Procedure

ELSEWHERE in this issue (p. 275) there appears the first instalment of a brief series of articles on the Final Report of the Committee on County Court Procedure. The care and consideration to detail which have been bestowed on this report are signs that it will not be relegated to limbo, like some other reports within living memory, but will probably receive early implementation. The authority and experience of members of the committee such as Mr. Justice AUSTIN JONES (chairman) and His Honour Judge DAVID DAVIES, K.C., His Honour Judge ALUN PUGH, Mr. GILBERT HICKS, and Mr. LESLIE HALE, M.P., have combined to produce a weighty volume of proposals which will reform, if it does not revolutionise, county court procedure. Among those who submitted memoranda and gave evidence were the Association of County Court Registrars, the General Council of the Bar, The Law Society, the Solicitors' Managing Clerks' Association, the Barristers' Clerks' Association, the Bentham Committee for Poor Litigants, the Council of County Court Judges, Mr. Registrar D. FREEMAN COUTTS, Mr. WILFRED DELL, Mr. C. K. DUTHIE and Mr. H. B. SISSMORE, to mention only a few in a long list. We particularly commend the proposals that the existing practice of solicitors "briefing" local solicitors to attend local courts should be regularised by dispensing with notice of change, the dispensing with the requirement of notice to produce to enable an otherwise undisputed document to be admitted in evidence, the repeal of s. 1 (1) of the Courts (Emergency Powers) Act, 1943, so far as it applies to county court judgments, and the reforms as to the scales of costs and the simplification of forms.

Preliminary Hearings

DR. C. K. ALLEN's letter to *The Times* of 21st April, commenting on Mr. EDE's reply to a question in the Commons on 14th April as to the publication of reports of preliminary hearings before justices, was printed too late to enable us to mention it in our "Topic" on the same subject in last week's issue. We are glad to observe that Dr. Allen's views on the matter correspond point for point with our own and to have his authoritative and independent support. Publication in newspapers of reports of preliminary proceedings before magistrates, he wrote, is a grave departure from our insistence on the "open minds" of juries. There is, he added, no question of secrecy, because examining magistrates do not try a case but merely decide whether there is evidence to go to a jury. The crux of the evil was indicated by Dr. Allen: "The effect is all the more damaging, because generally, the defence being reserved, the public learns only the evidence for the prosecution, and this is compressed

and 'high-lighted' by a reporter whose ideas of what will interest his readers may be very different from a full and fair account of the proceedings."

Crabbed Age and Youth

SOME comments by "Solicitor" in the *Howard Journal* for 1948–49 (vol. 7, No. 4), on the Report of the Royal Commission on Justices of the Peace, deserve quotation and examination with regard to the recommendation of a compulsory retiring age of seventy-five for justices. "Solicitor" comments: "Probably most people will think this much too high. Those who have experience . . . will not be surprised to find that 28 per cent. of male justices are over seventy, and about two-thirds are sixty and over. How can young people who are tried by these venerable gentlemen be said to receive the 'lawful judgment of their peers' to which they are entitled by Magna Carta . . . Reference is sometimes made to the age of High Court judges. Judges, however, are concerned mainly with law, and facts are for the jury. Moreover, High Court judges have been from their youth concerned with the law. And, after all, have some of our more aged justices always been perfect at assizes?" "Solicitor's" strictures may seem too strong when one reflects that with the prolongation of the expectation of life senile degeneration has become increasingly rare. It seems reasonable that the cooling of the passions and the accumulated experience of advancing years should produce a judicial and detached attitude which is of the highest value on the bench in determining questions of fact. In matters of punishment also there are many who think that older men are more sympathetic and less severe than their juniors. The view that the young should be tried by the young and the old by the old was never within either the spirit or the letter of the rule that persons should be tried by their peers. "Solicitor's" comments on other parts of the report will meet with general agreement and his article throws a new light on many familiar problems.

Charity and the Law

MR. FRANCIS BENNION has criticised the House of Lords' decision in *Gilmour* v. *Coats* (*The Times*, 9th April) in a letter to *The Times* of 19th April. It will be recalled that the House decided that a gift to an Order existing for prayer and contemplation is not a gift to a charity. He compared the decision with the recent case of *In re Moss* (1949), 93 SOL. J. 164, where Romer, J., held that a bequest to a single lady "for her to use at her discretion for her work for the welfare of cats and kittens needing care and attention" was a valid charitable bequest. Thus it appears that, in the eyes of the law, he wrote, the example of one person looking after cats is edifying, while that of an Order dedicated to "perpetual poverty, chastity, and obedience" is not. It is sad that the law should have taken this course. The answer appears to be that the Christian ideal is too lofty and far-reaching for mere human agencies to enforce, and that it should proceed voluntarily from within rather than that it should be enforced from without by the human agencies of law. Furthermore, as is implicit in the House of Lords' decision, the efficacy of prayer is a matter of faith and hope rather than of charity. There is, however, a good deal to be said for an amendment of the definition in *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, to include charitable gifts to all genuine religious organisations, and perhaps to facilitate the return of faith, hope and charity to an age sadly lacking in all three.

Taxation of Immediate Annuities

IN view of the proposal in the Budget that loans made against a life assurance policy of the kind concerned in *I.R.C.* v. *Wesleyan and General Assurance Society* (1948), 92 SOL. J. 193, shall be treated as annual payments within Case III of Sched. D, the remarks of Mr. A. L. HUNT, chairman and managing director, at that society's annual general meeting on 5th April, are of particular interest. Describing the "advance annuity policy" as one which separated capital from income and enabled the policyholder to secure the capital portion of his benefit by means of tax-free loans or advances, Mr. Hunt said that this form of policy corrects the injustice to purchasers of life annuities of having to pay income tax twice, once when they earn their money and later on when they have converted it into an annuity. He pointed out that with the advent of this type of policy the only valid excuse for taxing the capital portion of a life annuity—the excuse that that was the law—had vanished, and added that by granting income tax allowances for contributions and interest in respect of approved pension schemes the principle had been recognised that one should not tax contributions and interest as well as the annuity to which they gave rise. There is force in these contentions, and it is to be hoped that when the Finance Bill comes before Parliament they will be duly weighed.

Control of Borrowing and Bonus Shares

THE Control of Borrowing (Amendment of Exemption Provisions) Order, 1949 (S.I. No. 755), came into operation on 21st April. Its effect is to withdraw the complete ban on "free" bonus issues of shares (issues by capitalisation of reserves or profits) previously imposed by the Borrowing (Control and Guarantees) Order, 1947 (S.R. & O., No. 945). This is done by deleting paragraph 8 (3) of that order, which provided that the exemptions granted from Pt. I of the order should not apply to any issue of securities, if the purposes or the effect of the transaction consist of or include the capitalisation of profits. A company may now issue shares by capitalisation of reserves and profits, so long as its aggregate issues of all kinds, including bonus shares, do not exceed £50,000. Over that limit Treasury consent for bonus issues will have to be obtained and application will have to be made to the Capital Issues Committee.

Expedited Registration of Companies

WE understand that where it is desired to expedite the registration of a new company it will in future be the practice of the Registrar of Companies to require the submission, with the documents for registration, of a letter setting out the reasons why expedited registration is desired and giving satisfactory reasons why the registration should not pursue the normal course. What reasons will be accepted by the Registrar as "satisfactory" must at the moment remain a matter for conjecture. It will be remembered that hitherto the practice has been simply to notify the Registry of the date by which it was desired to complete the registration unless the applicant was content that the application should be dealt with in normal rotation.

Easter Law Sittings

FOR the Easter Law Sittings, which began on 26th April, the number of actions set down for hearing in the King's Bench Division is 764 (only 408 for the Easter term last year). Long non-juries number 366 and short non-juries 365 cases, and there are 11 special juries and 4 common jury actions. There are 13 cases in the commercial list, 4 short causes and one case in the Revenue list. On the other hand the Chancery Division list shows a decrease from 168 to 152 cases, of which 24 are non-witness and 103 witness actions, and there are 25 retained and other matters. The 70 companies matters will be heard by Mr. Justice WYNN PARRY. There are six appeals and motions in bankruptcy. There are 8 Admiralty cases for trial. There is also a decrease in the number of appeals to the Divisional Court, from 240 to 109, of which 29 are in the Divisional Court list proper, 34 are in the Revenue Paper and one in the Special Paper. The 167 pensions appeals of a year ago have dropped to 44 this year, and there is one appeal under the Housing Acts. The lists in the Court of Appeal also show a substantial fall, from 306 last year to 221 this year, of which only 21 are from the Chancery Division, including one bankruptcy appeal, 89 are from the King's Bench Division, including ten in the Revenue Paper, and 39 are from the Probate and Divorce Division. There is one Admiralty appeal. Appeals from county courts, including six workmen's compensation cases, number 68.

SOME RECENT CASES ON EVIDENCE IN CRIMINAL TRIALS

FOREIGNERS have often commented on the difficulty they experience in trying to understand our law of evidence so far as it affects criminal cases and, indeed, the difficulty has not always been confined solely to foreigners, for many are the students among us who have sat far into the night trying to fathom the many cases on evidence that adorn the reports. But now the doubt has been taken one stage further, for even amongst experienced practitioners he would be a bold man indeed who said that he understood what the law was on the points that are covered in the recent cases of *R.* v. *Sims* [1946] K.B. 531, and *Noor Mohammed* v. *R.* (1949), 93 SOL. J. 180. The latter case is one that was recently before the Privy Council, and therefore is not binding on the courts dealing with crime in this country, though of course the views expressed in that case deserve the great respect due to the opinions emanating from that body. *R.* v. *Sims* was a decision expounded by Lord Goddard, C.J., in a very strong Court of Criminal Appeal and one upon which the courts up and down the country have been acting for two or three years. It may be seen, therefore, that so far as these cases disagree there may be some considerable doubt as to what would be the result of an appeal to the House of Lords on the point; though of course the law as it stands now, which binds the English courts, is the decision found in *R.* v. *Sims*.

In both these cases the court was concerned to decide to what extent evidence was admissible against a prisoner which did not directly tend to show that he had committed the offence with which he stood charged, but which tended, when taken by itself, to show only that he was a man of bad character. Now, before the decision of *R.* v. *Sims*, it was generally thought that the law was fairly clear and that evidence of anything which did not tend to prove the offence charged, but only tended to prove that the accused was a man of bad character, was not as a general rule admissible. There were certain exceptions to this where the admission of such evidence would rebut a possible defence put up by the accused; thus, for instance, if the accused in his defence said that he had done a certain act by accident then evidence might be admitted, in order to rebut the defence of accident, to the effect that he had done a similar act in similar circumstances before. Apart, however, from certain fairly well defined exceptions of this type the general rule was that such evidence was not admissible. The importance of *R.* v. *Sims* was this: In that case the court held that the view expressed above was not an accurate picture of the law, and they said that the problem should be approached from a different angle. They considered that the proper approach was to say firstly that to prove an offence all evidence that is logically probative is *prima facie* admissible, and then secondly that it should only be excluded if it falls within an exception to the rule, such an exception being evidence that tends to show only that a man is of bad disposition *and nothing more*. In other words the importance of *R.* v. *Sims* was that it now makes it incumbent on the defendant to show that the evidence that the prosecution intend to put in falls within the exception, whereas previously it was presumed to be inadmissible unless the prosecution could show that it came within an exception and would assist in rebutting a defence by the accused of accident, or lack of guilty knowledge, or some similar defence. The Privy Council, in *Noor Mohammed* v. *R.*, have, however, come down on the other side of the fence.

It may, at first, be thought that there is really very little difference between the results that would flow in practice from the two views, and that this is merely a dispute as to the words in which the rule should be expressed, but this does not in fact appear to be the case. The reason for this is that on the older view (i.e., that evidence which tends to show that the accused has a bad disposition or tendency to commit the type of offence charged can only be admitted when it comes under the head of one of the recognised exceptions) the evidence can only be admitted when it tends to prove some issue before the court and such issue does not automatically arise merely by virtue of the fact that the accused has pleaded not guilty, and so, in a sense, put everything in issue. Lord Sumner put the point cogently in *Thompson* v. *R.* [1918] A.C. 221, at p. 232, when he said: "Before an issue can be said to be raised which would permit the introduction of such evidence, so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." Lord Goddard, in *R.* v. *Sims*, took the view that, everything being in issue on a plea of not guilty, the prosecution were entitled to call evidence to prove every issue thus raised. He said ([1946] K.B., at p. 539): "In any event whenever there is a plea of not guilty everything is in issue and the prosecution have to prove the whole of their case including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent." That, of course, puts the matter on a very different footing from the principles laid down by Lord Sumner in *Thompson's* case.

It was said earlier that the decision in *R.* v. *Sims* has been acted on for some time now, and so indeed it has; the extent, however, to which it would affect the administration of justice if the contrary view were at some later date held to be the proper one is not a question which it is easy to answer. *R.* v. *Sims* was a case in which the accused was charged with a number of unnatural offences, and the question of admissibility arose out of an application by the accused to be tried on the charges separately and not tried on all the charges joined in one indictment. Lord Goddard held that whether or not he was properly tried on all charges at once depended upon whether or not the evidence in support of the one charge was admissible at the hearing of another charge, and it therefore became necessary to decide the point that has been discussed above. Now in practice it is probably true to say that by far the greatest number of cases in which this point arises are cases of sexual or unnatural offences, and in a very large number of these cases one of the main issues is the question of the identity of the accused. For, in the very nature of the offence, it is probable that it is a question of the word of the accused against the word of his victim, and identity becomes the issue of paramount importance. *Thompson* v. *R.* showed, however, quite clearly that even on the law as it stood before *R.* v. *Sims*, there was no doubt that evidence of other matters which tended to show that the accused was a person prone to these unpleasant practices might be given in evidence. As Lord Sumner pointed out, it tended to establish the identity of the accused. He said: "There is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the* man . . . the evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognised as properly bearing that name . . . Persons who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which . . . stamps them with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity." This shows quite clearly that this evidence may be brought in where the identity is in issue and therefore in such a case where, if the accused were to be tried on only one count, he could put up the defence that it was not he that committed the offence, it is proper to join two or more counts and try them all at once, as the evidence on the other counts would in all probability be

admissible as proof of his identity. This being so it is suggested that in the great majority of cases of this type that come before the courts the evidence is admissible even on the law as it was before *R.* v. *Sims*, and only in the occasional case would the evidence not be admissible under the old rule but admissible as a result of the rule in *R.* v. *Sims*. The occasional case of a different nature does arise, as was shown by *Noor Mohammed* v. *R.*, and, as has already been said, in that case the Privy Council decided in favour of the old approach to the problem.

It is submitted with the greatest respect that the reasons that the court gave for disagreeing with the *dicta* of Lord Goddard in *R.* v. *Sims* are extremely cogent. They quoted Kennedy, J., in *R.* v. *Bond* [1906] 2 K.B. 389, who said: "If, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at a trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excluded evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions." Lord Sankey, L.C., expressed a similar opinion when, in *Maxwell* v. *Director of Public Prosecutions* [1935] A.C. 309, he said: "It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transactions which form the subject of the indictment and that any departure from these matters should be strictly confined."

It is clear that there is a divergence of the highest authorities on this point and one is reticent to express an opinion as to what the law is; but it is respectfully suggested that the older view is the better one. If that is so it would be more difficult to open the door to "novel and anomalous exceptions" and so the law would err, if at all, on the side of fairness to the accused. More particularly it would seem that this is the best view if to adopt it will not, in the majority of cases in which the point arises, cause a miscarriage of justice.

P. W. M.

CONDITIONS ATTACHED TO PLANNING PERMISSION: COST OF COMPLIANCE

A QUESTION much canvassed recently has been the enforceability or otherwise of conditional planning permissions after the expiry of the four-year period mentioned in s. 23 of the Town and Country Planning Act, 1947. The ordinary practitioner is probably more concerned with the financial implications of these conditions than with their ultimate enforceability. The Act has given to local planning authorities very generous powers of imposing conditions when they grant an application for planning permission. The authority may impose under s. 14 of the Act "such conditions as they think fit." They may even impose conditions which regulate the development or use of other land under the control of the applicant so far as this appears to them to be expedient in connection with the development authorised by the permission. For example, X who owns two plots of land on opposite sides of a cross-roads may want to develop one of those plots which is vacant land at present. Let us assume that the other plot which he owns is his own house and garden. The authority may be entitled to say "Yes, you can develop the vacant plot provided you set back the fence of your own house because the development you propose reduces the visibility at the cross-roads."

Another and very frequent type of condition imposed on development is that which requires the applicant to construct a service road, that is, a short length of road running parallel to the highway such as became common after the passing of the Restriction of Ribbon Development Act, 1935. The costs of road making are very heavy to-day and may well involve the developer in £2 10s. per foot of frontage or more. This is quite a considerable sum even on a short frontage; the question is, who is to pay for this?

A solicitor who is asked about this may recall that under the Restriction of Ribbon Development Act, 1935, s. 9, compensation was payable for injurious affection by conditions of this nature imposed under the Act. This compensation usually included the cost of the land given up, plus the cost of making the road. Occasionally something more was payable and occasionally something less because the service road could be said to better the property. But s. 9 is no more and the solicitor probably remembers that compensation for planning action is rarely payable under the 1947 Act. How then shall he advise his client?

The answer to this question is that the applicant should to-day be in very much the same position, so far as a service road condition goes, as he would have been under the Act of 1935, because he ought to get a reduction in his development charge. In assessing the development charge the Central Land Board are required by s. 70 of the Act of 1947 to value, in effect, the benefit of the planning permission. Where that permission contains a service road condition, the value of the permission is reduced because the applicant will be required to spend money in complying with the condition. The principle holds good for all conditions which will involve the applicant in the expenditure of money. In effect, therefore, compensation becomes payable by the Central Land Board by way of a reduction in development charge.

It is worth noting in passing that these service roads are not always required to be put in immediately; a common type of condition requires that they be constructed if and when in the opinion of the local planning authority the development of adjoining land makes the road necessary. In these cases the Board would appear to have an option either to give an immediate reduction in a charge or to charge the full amount, leaving the owner to apply to have the charge varied under s. 73 when the local planning authority require the road to be put in. It is understood that in general the Board will give an immediate reduction in charge, but the reduction will be smaller as the liability is not immediate but deferred.

The position of the single plot owner may at first sight appear unsatisfactory in the light of what has been said above. It is commonly said that he will receive a payment from the £300m. fund equal to the amount of his development charge. If this were so he would obviously still have to pay for the service road himself. Assume that the road would cost £100 to put in and that the development charge is assessed at £200 instead of the £300 which would have been payable if there had been no service road. The owner would then receive £200 in compensation which just pays the development charge, leaving him to find £100 to put the service road in. Happily this is an entirely false calculation and arises from a very common though inaccurate statement of the single plot owner's position. He is entitled to compensation equal to the amount of the development *value* in the land and will, therefore, get £300, of which £100 will go to the road making and £200 to the Central Land Board as development charge.

This leads us naturally to our last point. If the development value of the land is very small and the cost of complying with the conditions in the planning consent is very heavy the developer may find himself paying for those conditions out of his own pocket. One example should make this clear. Assume a single plot owner with a plot of land in which the development value is only £150; further assume that the cost of putting in a service road is £200. In this case the owner must find £50 out of his own pocket. The Central Land Board can do no more than reduce the development

charge to nothing. They cannot contribute to the expenses of the developer.

Most of the examples in this article have been related to service roads, but the principles are equally applicable to any other type of condition, e.g., conditions providing for the restoration of a site at the expiry of a planning permission, etc. The moral for the private practitioner appears to be obvious, and that is to see that any conditions imposed—even if they are imposed by agreement with the developer—are clearly and precisely set out in the planning permission. For their part local planning authorities must obviously do their best to make the condition as easily capable of valuation by the Central Land Board as possible.

J. K. B.

COUNTY COURT PROCEDURE—I

An essential feature of county court practice is that it should be flexible—able to cope efficiently with litigants appearing in person and unversed in technical matters of pleading and evidence, with considerable numbers of debt-collecting actions requiring routine work with little preliminary or interlocutory skill, and with substantial contested actions and matters demanding the availability of a complete armoury of procedural weapons. It has been generally thought that this object was achieved in large part by the complete modernisation of the county court system which became effective on the 1st January, 1937, by virtue of the County Court Rules, 1936. Experience has indicated some gaps but no very crucial defects in the framework.

In April, 1947, the Lord Chancellor appointed a Committee (of which Mr. Justice Austin Jones was appointed Chairman) to inquire into the practice and procedure in county courts, with the particular object of considering the possibility of reforms designed to reduce the cost of litigation and secure the efficient despatch of business. The Final Report of this Committee (Cmd. 7668) has just been published, following an Interim Report issued in July, 1948, which was concerned with the hearing of actions in the judge's list and the avoidance of adjournments for want of time.

It was not within the terms of reference of the Committee to consider, or make recommendations as to, a general increase in the jurisdiction of county courts.

The Committee expresses the view that "as a result of experience gained since 1936 there is room for some major reforms and a large number of minor improvements in procedure." It is not considered practicable to achieve a general reduction in the cost of litigation by cutting the costs allowed to successful litigants, but some recommendations are designed to lower the costs in uncontested cases—mainly debt collecting not justifying the same measure of remuneration as more meritorious work—and also to reduce the expense of contested cases. The main recommendation to facilitate the despatch of business is to increase the powers of the registrar.

The observations which follow indicate the principal recommendations of the Committee, some of which can be implemented by amendments to the existing County Court Rules, but others necessitating legislation.

Commencement of Proceedings

It does not appear that the Committee found it necessary even to consider any amendment of the existing regulations as to venue. Nor is there any suggestion for major reform in the existing forms of action. A discussion of the seemingly attractive idea of complete uniformity in the method of initiating all kinds of proceedings in county courts, and indeed of the form to be used therein, did not convince the Committee of its practicability. And a suggestion that the differences between ordinary actions and default actions should be abolished, so as to provide only one type of action, was also regarded as unsatisfactory. In the result, it is thought that both default and ordinary actions should continue to be available as at present, to be used by a plaintiff at his own option, to suit his own particular needs, subject only to Ord. VI, r. 2 (2), which contains limitations on default actions to remain unaltered except in one respect.

Default Actions

The last-mentioned proposed alteration is that default actions should be allowed, if otherwise permissible, whatever may be the amount claimed, so that a default summons could be issued where the claim is £2 or less. This was indeed possible under the 1936 Rules, but was abrogated, for no very obvious reason, by the County Court (Amendment) Rules, 1943.

As a result of the Committee's general proposals for the revision of court fees, to be hereafter noted in more detail, the fee to be paid on the entry of plaint will be different—in general, higher. This last feature will be offset by the absence of fees now payable on the entry of judgment or the disposal or hearing of actions.

New tables of fixed costs for entry on summonses when issued are also proposed. The general question of costs is discussed later.

A minor suggested reform is that a plaintiff should, if he wishes, be entitled to receive a separate plaint note for each case entered by him. This would eliminate the irritating experience of controlling the filing of, and means to discover, plaint notes which relate to two or more cases, each developing in different ways and at different times and speeds.

No radical suggestion is made with reference to the mode of serving default summonses. In general, personal service is regarded as the appropriate method. It is, however, recommended that the provisions of Ord. VIII, r. 8 (1A), introduced as a helpful war-time measure in 1944, should be applied to default actions. Where the bailiff has failed to effect service and the registrar is satisfied from the bailiff's report that service by post (ordinary or registered) would be effective, the registrar may of his own volition, without requiring any application by the plaintiff for an order for substituted service, make an order for service by post. It is clearly thought that this extension of facilities should not be available in cases where service by solicitor has been requested. In such cases the existing rules about applications for an order for substituted service could be resorted to, or presumably a failure to achieve results might induce the plaintiff's solicitor to lodge the summons in court for service by bailiff.

Except as to the costs to be allowed, there will be no change as respects the entry of judgment in default of defence under Ord. X, r. 2.

A useful reform is proposed with regard to cases where the defendant in a default action files an admission with an offer of payment. Instead of immediately fixing a date for the disposal of the action, and giving notice thereof, the registrar will first give the plaintiff an opportunity of accepting the offer. If he does so, judgment will be entered accordingly immediately, without any further attendance at the court. If he does not accept the offer, the present procedure will be applied, and the action disposed of accordingly.

Somewhat similarly the plaintiff should be given an opportunity of accepting in settlement part only of his claim as admitted by the defendant. At present a case in which a partial admission is filed is treated as defended, and notice of trial is given automatically. It is proposed that this should only be done where the plaintiff indicates his non-acceptance of the amount admitted, thus reverting to the pre-1937 practice under Ord. VII, r. 34D (3), of the County Court Rules, 1903.

There is a suggestion for closing a gap in the provisions relating to defences in default actions. Under the present rules there is no direct method by which a plaintiff can obtain further and better particulars of defence. He must resort to a general application for directions under Ord. XIII, r. 3. It is proposed to remedy this defect by authorising an

application for such particulars in the same manner as is at present allowed in ordinary actions under Ord. IX, r. 4 (6).

Ordinary Actions

Where the commencement of an action is necessary merely for the purpose of securing the court's approval to a proposed settlement in a case where the claimant is an infant, or otherwise under disability, it is proposed (rejecting a suggestion that an originating application might be an appropriate process) that the particulars of claim should take an abbreviated form, including a request for approval of the settlement, and that the matter should be dealt with (presumably more or less immediately) in chambers. Moreover it is proposed that the determination of such matters should be within the powers of the registrar.

The proposed revision of plaint fees mentioned above would apply equally, of course, to ordinary actions.

It is recommended that service of an ordinary summons may be effected by the plaintiff's solicitor, under the same conditions that he can now serve a default summons.

A proposed major reform is that, in general, ordinary summonses should be served by A. R. registered post, of which a full description is given in para. 35 of the Final Report. If the material A. R. form is not signed, the service will be treated as doubtful under Ord. VIII, r. 30. If the postal packet with the summons is returned by the Post Office as undelivered, some other prescribed method of service must, if time permits, be attempted. Failure will result in the summons being marked " not served," with the usual consequences, modified in an important way, as indicated below. It is pointed out that the efficacy of this innovation will be dependent on full and accurate particulars of the defendant's address being given by the plaintiff in the *præcipe*, and he may indeed be required to state, as a preliminary, that he has reason to believe a letter will reach the defendant if posted to the stated address, under possible penalty as to costs if an inaccurate statement later results in an application to set aside a judgment on the ground of non-service.

It is proposed that an ordinary action should be capable of enduring for twelve months in the same way as a default action, instead of abating, as now (subject only to the successive summons machinery), by reason of non-service in time for the appointed hearing; that ordinary summonses should be renewable beyond the twelve months as well as default summonses; and that while a summons is current as many successive summonses may be issued as may be required to effect service, the first without fee, but subsequently on payment of a fee (apparently 5s.).

It is a commonplace of county court work that defendants in ordinary actions neglect the opportunity to file an admission though the claim is undisputed. This results in wasted trouble and work in relation to the necessary preparation for the hearing, and, of course, extra costs are incurred and fall on the defendant. One of the difficulties in such cases may be avoided by a recommendation for the extension of the provisions of Ord. XX, r. 3A, which will enable evidence of the plaintiff's claim to be given by affidavit, thus obviating the personal attendance of a witness at court. It is to be hoped that the simplified forms of ordinary summons proposed by the Committee will induce closer attention by the defendant to his responsibilities and best interests in this respect. If an admission is filed and an offer made, and the plaintiff notifies acceptance of the offer, judgment may be entered accordingly forthwith, without waiting for the date fixed for the hearing of the case, or requiring the formality of the plaintiff's solicitor attending thereon.

Other Originating Process

A few minor suggestions are made with respect to the conduct of matters, as distinct from actions.

It is considered that no useful purpose is served by requiring that certain matters should be commenced by petition, although (under Ord. VI, r. 5) these are confined to instances where so required by statute or rule. It is therefore recommended that this procedure should be abolished, and that all such matters should be dealt with by means of originating applications.

It is proposed to make it clear that originating applications may be amended before service, and also that in case of non-service one or more successive originating applications may be issued, in the same way as summonses in ordinary actions.

Interim Applications and Proceedings

A number of recommendations are made by the Committee plainly with a view to eliminating possibly unnecessary work in interim applications and to ease the burden of preparing for trial, no doubt in the hope of reducing the costs of litigation.

Where a party desires to obtain discovery of documents by his opponent, he should first apply to the other side, out of court, to make the appropriate affidavit; and an application to the court for an order for the making thereof should only be necessary where this request has not been complied with within a reasonable time.

The Committee urges a more extensive use of the provisions of Ord. XX, r. 9, under which notices to admit specific facts may be given; so much so that a party may be in difficulty as respects the costs of proving a fact which could have been covered by such a notice, or where an " unnecessarily elaborate method of proof " has been adopted. There should be agreement between the parties, so far as possible, as to the documents admitted by them without formal proof (obviously embracing correspondence) like the universal practice obtaining in the High Court, so that an agreed bundle of correspondence and/or other documents may be available for, and handed to, the court at the hearing. The Committee recommends measures which would permit the more considerable use of evidence by affidavit. Attention is drawn to the existing enabling provisions of Ord. XX, r. 5, under which affidavits can be used after prior notice in the absence of objection by the other side.

Under Ord. XX, r. 4, affidavit evidence can be used upon the order or with the sanction of the judge. The Committee recommends that the powers under this rule should also be entrusted to the registrar. But where the registrar makes an order that a particular fact or facts can be proved by affidavit at the hearing, the judge, if the case is heard by him, may nevertheless refuse to admit evidence so tendered " if in the interests of justice he should think fit to do so."

It is recommended that the provisions of Ord. XX, r. 3A, should be extended. At present they permit the use of affidavit evidence in ordinary actions where no defence has been filed, but only where the plaintiff does not reside or carry on business in the district of the court in which the proceedings are brought. The suggestion is to omit the last qualification, so that the procedure may be used wherever the plaintiff resides or carries on business. By this method the attendance at court of a witness to give oral evidence of a debt, very often of small amount, will be avoided. It may well be that a plaintiff's solicitor will find it desirable to attend court on the hearing of such an action, armed, as he will be, with an affidavit in the form of a simple proof of debt. Experience suggests that it is in such a case that the defendant may attend, although he has no intention of disputing liability and only wants time to pay. He should have filed an admission and offer, but has not done so, and quite possibly will still neglect to do so. If the plaintiff's solicitor does not attend, the defendant will have the field to himself in contending with the court as to the manner in which he is able to discharge his liability. If the registrar in such circumstances thinks it desirable to adjourn the case for the plaintiff or his solicitor to attend, the advantage derived from the Committee's recommendation will be largely negatived by the substantial mischief and costs of adjourned cases. But it may be noted that the plaintiff's solicitor would in fact be justified in not attending court on the date fixed for the hearing in reliance upon Ord. XXIII, r. 2 (3), although this attitude may lead to undesirable adjournments.

The Committee appears to have given some detailed consideration to the operation of the provisions of the Evidence Act, 1938, and makes recommendations for amendment

to facilitate the use of written statements as evidence without requiring the maker to attend court to give oral evidence in the usual manner. It is suggested that s. 1 (2) of the Act should be amended by deleting the requirement of " undue delay or expense " as a condition for dispensing with the attendance of the maker; and that s. 1 (3) should be amended to permit the admission of a statement by a " person interested."

It is further recommended that secondary evidence of a document should be admissible notwithstanding failure to give notice to the opposite party to produce the original in his possession, except where there appears to be a genuine dispute as to the authenticity of the document. If an adjournment is granted because of an objection to secondary evidence on this ground, and it is later considered that the objection was " unreasonable," the objector may be mulcted in costs.

G. M. B.

SMALL TENEMENTS RECOVERY ACT, 1838

THE remarks of Lord Goddard, C.J., in the recent case of *Bowden* v. *Rallison* [1948] 1 All E.R. 841, once more raise the question which has been the subject of conflicting opinion between solicitors advising the institution of proceedings for possession whether to institute those proceedings in the magistrates' court under the Small Tenements Recovery Act, 1838, or in the county court. As this hundred-year-old statute only applies to tenancies where the rent does not exceed £20 a year, which is a small rent in these days, there are only a limited number of cases where this procedure is available and where this problem arises.

Lord Goddard pointed out that when this Act was passed no county courts, as we understand them, existed and it was desirable to provide some method by which disputes with regard to small tenements such as cottages could be determined. He said: " This Act is full of pitfalls and very technical considerations apply. Parties would be much better advised if they took advantage of the county court, where proceedings for the recovery of houses are much simpler, and also they have the advantage that a trained lawyer—a county court judge—hears the case."

Magistrates' courts have never been very enthusiastic about possession cases under this Act, and in *R.* v. *Kent Justices; ex parte Triplow* (1927), 137 L.T. 25, a mandamus was granted against justices who had refused to hear a case on the ground that the county court was a more suitable tribunal.

Section 1 of the Act provides that where a house, land or other corporeal hereditament has been held at will or for a term not exceeding seven years, either rent free or at a rent not exceeding £20 a year, and the term has ended or has been determined by a legal notice to quit or otherwise and the tenant or occupier neglects or refuses to give up possession, the landlord can recover possession summarily before the justices. For this purpose he must serve on the tenant or occupier a written notice, signed by himself or his agent, of his intention to proceed for possession under the Act. The form of this notice is provided in the statute and must be strictly followed. One of the requirements of the notice is that the landlord must set out the nature of the tenancy and show that it has expired or has been validly determined by notice to quit and the date of that expiration or determination.

Bowden v. *Rallison*, *supra*, is a decision which illustrates the difficulty of procedure under the Small Tenements Recovery Act for possession of property which is subject to the Rent Restrictions Acts. Under these Acts an owner can only recover possession of premises to which the Acts apply upon certain grounds.

The effect of a notice to quit upon a tenant of property to which the Rent Restrictions Acts apply is to determine the contractual tenancy, but, as the landlord is not entitled to enforce the notice by recovering possession, a tenant who holds over is protected by the statute and becomes what is conveniently called a statutory tenant, i.e., a tenant who is in possession of the property by virtue of the statutory provisions of the Rent Acts and not by virtue of any agreement. It was held in *Shuter* v. *Hersh* [1922] 1 K.B. 438, that when a tenant is holding over as a statutory tenant, the original tenancy having been determined, no notice to quit is required to enable the landlord to apply for an order for possession.

The facts in *Bowden* v. *Rallison* were that the landlord gave to the tenant, who held a tenancy of a cottage subject to six months' notice, a proper notice to quit which expired on 11th October, 1939. The tenant remained in possession after the expiration of the notice under the provisions of the Rent Restrictions Acts and continued to pay the rent each week. The landlord then gave a second notice to quit on 10th November, 1947. In this case the landlord was in a position to claim possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (*g*) (ii), on the ground that the cottage was required for the occupation of a cowman who was employed on the landlord's farm.

It was held that on the expiry of the first notice on 11th October, the tenant became a statutory tenant, and therefore the second notice to quit was a mere nullity and the notice given under the Small Tenements Recovery Act was invalid, since it failed to state correctly the nature of the tenancy and the date on which it was determined.

Another difficulty of procedure under this Act of 1838 is caused by the provisions of the Courts (Emergency Powers) Act, 1943.

The procedure under the Small Tenements Recovery Act may be invoked by a mortgagee to whom a mortgagor has attorned tenant (*Dudley and District Benefit Building Society* v. *Gordon* [1929] 2 K.B. 105), but the provisions of the Courts (Emergency Powers) Act, 1943, may present difficulties. Section 1 (2) provides that subject to the provisions of the Act, a person shall not be entitled, except with the leave of the appropriate court, (*a*) . . . to proceed to exercise any remedy which is available to him by way of . . . (ii) the taking of possession of any property . . . (iv) re-entry upon any land, or (*b*) to instruct any proceedings for the recovery of possession of mortgaged property. The effect of this provision was considered by the Court of Appeal in *Whitstable Urban District Council* v. *Tritton* (1941), 86 SOL. J. 21, where the plaintiff council served on a defendant a notice to quit a house of which he was a tenant and, on his failure to comply with the notice, obtained from the county court an order for possession. The Court of Appeal held that the plaintiffs were entitled to apply for a writ of possession without the leave of the court under s. 1 (2) of the Courts (Emergency Powers) Act, 1939, which only refers to matters of self-help and has no application to cases where it is merely sought to enforce an order already made by the court. This case was followed two years later by *Butcher* v. *Poole Corporation* [1943] K.B. 48 (C.A.), where it was held that an employer who re-enters into possession of a house let free to an employee, in virtue of his occupation, after the termination of the employment and the employee's refusal to give up possession, is not bound to obtain prior leave under the Courts (Emergency Powers) Act, 1939, as the statutory remedies exercisable under that Act only arose where there had been default in paying a debt or performing an obligation.

It was contended on behalf of the owner that the employee was only in possession of the premises as an employee on behalf of his employers, but while this argument was not rejected, the case was decided on the assumption that his occupation during the employment was the occupation of a tenant and that he had possession for himself throughout. Lord Greene, M.R., in distinguishing the case from one where leave to proceed was required, said: " It was argued . . . that what the defendants did was to exercise a remedy which was available to them and that that remedy was a remedy by way of taking possession of the property and was also a remedy

by way of re-entry upon the land. In the abstract no doubt a person who takes what is his own is exercising a remedy . . . But the question which we have to decide is not whether it is correct in an abstract sense to describe the action of an owner of land in taking possession of his land as the exercise of a remedy by way of taking possession of land or re-entry, but whether, in the context of this Act of Parliament, it is a remedy of the kind referred to in s. 1 of the Courts (Emergency Powers) Act, 1939."

He went on to say that a remedy by way of taking possession of land or re-entry upon land may be a remedy, the exercise of which determines or defeats some right or title in the person against whom it is exercised, or it may be a remedy the exercise of which is merely an exercise of the existing right of property of the person exercising it, and does not defeat or determine any estate or interest or title of the person against whom it is exercised. As an example of the former kind, he quotes the entry of a landlord upon the determination of a lease as contrasted with a re-entry for breach of covenant, which determines the existing interest of the tenant.

The effect of an attornment clause in a mortgage is to create the relationship of landlord and tenant between the mortgagee and the mortgagor, and the mortgagee can avail himself of the summary procedure of the Small Tenements Recovery Act where the mortgaged property comes within the provisions of this Act. He cannot, however, enforce a power of distress, inasmuch as the clause is invalid unless registered under the Bills of Sale Acts (*Re Willis; ex parte Kennedy* (1888), 21 Q.B.D. 384 (C.A.)). But non-registration of an instrument containing an attornment clause will not cancel the relationship of landlord and tenant thereby created, and an attornment clause is frequently inserted in mortgages so as to enable the mortgagee to obtain possession without the delay occasioned by more protracted proceedings.

Whether a mortgagee who seeks an order for possession of property, of which the mortgagor has attorned tenant is seeking to enforce a remedy to which the provisions of the Emergency Powers Act apply, has not been decided. Such a case is not mentioned in the examples given by Lord Greene in *Butcher* v. *Poole Corporation*. In the case of an ordinary tenant, it is clear from the *Whitstable* and *Poole* cases that the landlord is not restricted provided he has determined the tenancy by notice, even though notice has been served by reason of non-payment of rent.

It has been held that it is not essential to the relationship of landlord and tenant that the landlord should be entitled to create the tenancy, and that if he purports to do so and has delivered possession to the tenant, the latter is estopped from disputing his title. Estoppel, however, is only a rule of evidence, and in most tenancies the landlord has some legal estate in the demised property, whereas the tenant has none, save that created by the demise itself.

A mortgagor in possession who has a attorned tenant has legal estate in the mortgaged property, and it may be that by reason of the artificial nature of the tenancy created by an attornment clause the action of the mortgagee in seeking to obtain possession under the clause is an institution of proceedings for the recovery of mortgaged property within the meaning of s. 1 (2) (*b*) of the Act of 1939, for which leave to proceed is necessary.

Applying Lord Greene's test as to whether the exercise of the remedy determines or defeats some right or title of the mortgagor or is merely an exercise of the existing right of property of the mortgagee which does not defeat or determine any such right or title of the mortgagor, it may be contended that the exercise of this remedy does, in fact, defeat the right of the mortgagor to possession of the mortgaged premises, a right which he would enjoy but for the attornment clause. The importance of this question in relation to the Small Tenements Recovery Act is that if the Emergency Powers Act applies to the case of a mortgagee obtaining possession, it will be necessary for the mortgagee to obtain the leave of the court. By s. 7 of the Act of 1939 the appropriate court for giving leave is such court as may be designated by rules made under the Act, and such rules may designate different courts in relation to different classes of proceedings.

The rules at present in force are the Courts (Emergency Powers) Rules, 1943. Rule 3 provides that the appropriate court for the giving of leave to institute or take a step in proceedings shall be the court in which the proceedings are to be instituted or are pending.

Rule 5 (*b*) provides that the appropriate court for the giving of leave to enter into possession of land where neither the value of the land nor the rent payable in respect thereof exceeds £100 a year shall be the county court. Rule 39 provides that in proceedings in a court of summary jurisdiction where there is a claim to a judgment to which s. 1 or s. 2 of the Act applies an application for leave to proceed may be made at the time when judgment is given in the presence of the defendant or his solicitor or, if, at the request of the complainant, a notice adapted from Form 3 of the rules has been served on the defendant, with the summons, and the court may, at the time when the judgment is given, make an order giving leave to proceed or such other order under the Act as the court thinks proper.

There is no summons in the procedure under the Small Tenements Recovery Act, but the notice prescribed by the Act is served on the defendant, and if the Courts (Emergency Powers) Acts do apply, presumably it would be in order to serve such a notice under the 1943 Act at the same time. In most cases arising under the Small Tenements Recovery Act, 1838, leave under the Act of 1943 is not required.

Another difficulty that may arise under the Small Tenements Recovery Act, 1838, arises from the definition of the word "agent." Section 7 provides that the term "agent" shall be taken to signify any person usually employed by the landlord in the letting of the premises, or in the collection of the rents thereof, or specially authorised to act *in the particular matter* by writing under the hand of such landlord. This section is a special restriction on the construction of the word "agent."

In *Bailey* v. *Hookway* (1945), 109 J.P. 69, it was held that solicitors who were not usually employed by the landlord in letting the premises or in the collection of rents, and who had not been specially authorised to act in that particular matter by the landlord in writing, were not "agents" within the meaning of the section and were not entitled to serve a notice under s. 1. The Act lays down a specific mode of service which must be strictly followed, otherwise the service of the notice will be invalid. The notice must be read over to the person on whom it is served, and the nature and purpose of the notice must be explained. Perhaps, having regard to the ancient phraseology of the notice, which must not be departed from in any way, this is a very necessary requirement.

As previously indicated, the number of ordinary dwelling-houses to which this Act applies is limited. There is one class of landlords, however, quite large in number, who can recover possession under the Act, notwithstanding the amount of the rent payable. These are local authorities exercising their powers under the Housing Act, 1936. Section 156 (2) of that Act provides that where a local authority, for the purpose of exercising their powers under any enactment relating to the housing of the working classes, require possession of any buildings of which they are the owners, then, whatever may be the value or rent of the building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838.

In *R.* v. *Snell; ex parte St. Marylebone Borough Council* [1942] 2 K.B. 137, the Divisional Court held that if a local authority require possession of a dwelling-house to let to another member of the working classes this is a requirement which comes within the purposes of the Housing Act, and s. 156 (2), which allows the procedure under the Small Tenements Recovery Act, is applicable. This case has been confirmed by the Court of Appeal in *Shelley* v. *London County Council; Harcourt* v. *Same* (1948), 92 SOL. J. 11 (confirmed by the House of Lords on 9th November, 1948: see *ante*, p. 101).

In proceedings under the Act of 1838 the justices have no discretion and are obliged to issue a warrant for possession on proof of the proper determination of the tenancy and compliance with the statutory provisions concerning the form and service of the notice, and the warrant must be executed within twenty-one days from the date of the order, otherwise it becomes a nullity. This, however, does not apply to those tenancies which are subject to the Rent Restrictions Acts, because s. 5 (4) of the Act of 1920 provides that every warrant for delivery of possession of, or to enter and give possession of, any dwelling-house to which the Act applies shall remain in force for three months . . . in the case of a warrant under the Small Tenements Recovery Act, 1838, from the date of the issue of the warrant and for such further period or periods, if any, as the court shall from time to time, whether before or after the expiration of three months, direct. L. C.

A SURREPTITIOUS REPEAL

THE voluminous and closely detailed regulations by which, in time of war, the legislature and its ministerial delegates strive to adapt our comings and goings to conditions of emergency may sometimes cause difficulty and uncertainty, not only during the period of their operation, but also when the time comes to release us from their toils. Readers will remember that an example of this was prominently reported two years ago, when *Wicks* v. *Director of Public Prosecutions* [1947] A.C. 362, raised the question whether a man could be tried for an offence against a Defence Regulation which had expired before he was brought to trial. Section 11 (3) of the Emergency Powers (Defence) Act, 1939, from which the regulations derived their force, provided that the expiry of that Act (and with it the regulations) should not affect its operation as respects things previously done or omitted. But did that subsection itself expire with the remainder of the Act, there being no express saving? This point was contested as far as the House of Lords, where it was held that, if its words were to be given their natural meaning, Parliament could not have so intended. Accordingly the appellant's conviction stood.

Certain other Defence Regulations have since expired under the terms of the Emergency Laws (Transitional Provisions) Act, 1946, and the Emergency Laws (Miscellaneous Provisions) Act, 1947, which Acts are later referred to by their years of enactment. For instance, reg. 20 of the Defence (General) Regulations, 1939, dealing with the change of name of aliens, was continued until the 31st December, 1947, by the 1946 Act, and then expired under the 1947 Act. The writer is indebted to a London firm of solicitors for calling attention to a somewhat curious result of this apparently routine sequence of events.

The legislation passed in 1914 to facilitate the official supervision of the activities of aliens, not necessarily our enemies, who were then in this country, was given a more permanent form in 1919 by the Aliens Restriction (Amendment) Act of that year. Parts even of that Act were expressed to be temporary only, but the annual Expiring Laws (Continuance) Acts have continued them year by year ever since. Section 7, restricting changes of name, is couched in language which imports no suggestion that it is not intended to be permanent.

Under s. 7 (1) of the 1919 Act an alien might not, subject to exemption on certain grounds, for any purpose assume or use any name other than that by which he was known on the 4th August, 1914. And by subs. (2) an alien who carried on alone or in partnership a trade or business in any name other than that under which the business was carried on on the 4th August, 1914, was deemed to be within subs. (1). As time went by there grew up a large "intake" into the community of aliens in this country who were unaffected by the section, having been born since the relevant date. Thus, unlike the majority of the restrictions on aliens, which required no strengthening to meet the 1939 emergency, this restriction on change of name called for revision in the series of safeguards which Parliament authorised by the Emergency Powers (Defence) Act, 1939. Regulation 20, *supra*, accordingly introduced an amendment of s. 7. Not merely did it name a new date: it substituted an entirely new form of words for the first two subsections. After the 1st September, 1939, s. 7 (1) read as follows: "(1) No alien who is in the United Kingdom on the date of the coming into force of Regulation 20 of the Defence Regulations, 1939, shall, while in the United Kingdom at any time after that date, assume or use or purport to assume for any purpose any name other than that by which he was ordinarily known immediately before the said date."

Commenting on this amendment at the time, the learned editors of Butterworth's Emergency Legislation Service (Statutes Vol., p. 9) said that s. 7 "will, unless Parliament alters the law meanwhile in the same sense, revert to its original form when the Emergency Powers Defence Act . . . expires." And indeed there is no cause whatever to doubt the soundness of that observation, giving full weight to the precautionary clause beginning "unless." The remarkable feature, as it now seems, is the method which has been adopted by Parliament in order to "alter the law meanwhile." As will appear, the alteration is not "in the same sense," but in the sense of a virtual repeal of all restrictions on the change of name by an alien.

Now, a statutory regulation made *intra vires* of the authority which makes it is to be regarded as though it were itself an enactment; Viscount Simon in *Wicks'* case, *supra*, expressly approves the decision to that effect in *Willingale* v. *Norris* [1909] 1 K.B. 57. The effect of reg. 20 in substituting a new subs. (1) in s. 7 of the 1919 Act was, therefore, for the time being as if the original subsection had been repealed. Had the Emergency Powers (Defence) Act been repealed, or reg. 20 revoked, as distinct from being allowed to expire, the position would have been governed by s. 38 (2) of the Interpretation Act, 1889, which enacts that where an Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not revive anything not in force or existing at the time when the repeal takes effect. Section 11 of the Interpretation Act really deals with a particular instance of this. Under that section where an Act repealing, in whole or in part, a former Act is itself repealed, the last repeal does not now revive the former enactment unless words be added reviving it. If that were not so, the Statute Law Revision Acts, of which Parliament recently passed the latest example, would need to pick out for preservation many obsolete sections lest by their repeal some provision yet longer spent should spring up to embarrass the unsuspecting. But these provisions of the Interpretation Act confine themselves to cases of repeal, and do not expressly cover the expiry of a statute; hence s. 11 (3) of the Emergency Powers (Defence) Act referred to in connection with *Wicks'* case.

What the Legislature has done in the 1946 Act (s. 1 (3)) is to enact that s. 38 (2) of the Interpretation Act, 1889, shall apply on the expiry of any Defence Regulation within s. 1 of the 1946 Act as if the regulation were an Act of Parliament *and had then been repealed*. Thus the original provisions of s. 7 (1) and (2) of the 1919 Act, not being in force at the time of the expiry of reg. 20, are not then revived, and may thenceforth be regarded as a dead letter. Bearing in mind that the 1919 restrictions appeared to be permanent and operated over twenty years, whereas ostensibly the Defence Regulations were temporary and delegated legislation, the result is surely unexpected and the method of repeal unorthodox.

It should not be overlooked that an alien is bound by Article 6 of the Aliens Order, 1920, to register certain particulars, including his full name, and that particulars of any circumstances affecting in any manner the accuracy of the particulars previously registered are to be furnished within seven days after the circumstance has occurred. Thus a change of name by an alien, though now unrestricted, is clearly notifiable. J. F. J.

Company Law and Practice

THE REGISTRATION OF CHARGES

THE law relating to the registration of charges has been modified in several minor respects by the Companies Act, 1948. For the most part, however, the law on this subject remains unchanged by the new Act, but, for the sake of convenience, such changes as have been made are briefly set out at the conclusion of this article.

Section 95 of the Act re-enacts the provisions of s. 79 of the 1929 Act, whereby a charge to which the section applies "shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars by which the charge is created or evidenced are delivered to the registrar of companies within twenty-one days after the date of its creation." Section 101 of the Act provides for the extension of time for registration and/or the rectification of the register of charges. The court must, however, be satisfied that the omission to register a charge within the time required by the Act or the omission or mis-statement of any particular with respect to any such charge was either (*a*) accidental or due to inadvertence or to some other sufficient cause, or (*b*) is not of a nature to prejudice the position of creditors or shareholders of the company, or (*c*) that on other grounds it is just and equitable to grant relief. In any such case it will be recalled that the court may on the application of the company or of any person interested order that the time for registration shall be extended or (as the case may be) that the omission or mis-statement of particulars shall be rectified.

The following questions, *inter alia*, arise on the exercise of the court's discretionary power under s. 101 to extend the time for registration. First, under what circumstances will the court exercise its discretionary power? Secondly, what form should the order of the court take and in particular should it make any provision for unsecured creditors; and thirdly, what evidence is necessary to support such an application? These questions were recently discussed by Vaisey, J., in *Re Kris Cruisers, Ltd.* [1949] Ch. 138, and I will deal with them in the order set out above.

It seems that the court will exercise its discretionary power to relieve a mortgagee or chargee of the consequences of his own negligence or lack of caution, provided that it is satisfied that the omission to register was not an omission with any fraudulent intention but was in the words of the Act "due to inadvertence or some other sufficient cause." In *Re Kris Cruisers, Ltd., supra*, the omission was caused by an obvious mistake. The solicitors of the chargees thought that the secretary of the company had registered the charge and the secretary of the company thought that the chargees had registered the charge themselves. Vaisey, J., said: "That seems to me to be inadvertence, inattention, carelessness, but very far removed from the kind of case in which this relief should be refused—a typical case of which would be obviously where there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public to whom registration of it would have given the appropriate notice."

An order was made in the form set out below by Clauson, J., in *Re L. H. Charles and Co., Ltd.* [1935] W.N. 15, and this is in fact the usual form of order (cf. Court Forms and Precedents in Civil Proceedings (Lord Atkin), vol. 6, p. 222): "And this court, being satisfied that the omission to register the charge contained in the said legal charge [or as the case may be] particulars whereof are set forth in the schedule hereto within the time required by the Companies Act [1948] was due to inadvertence. Doth pursuant to [s. 101] of the said Act, order that the time for registration of the particulars of the said charge be extended until . But this order is to be without prejudice to the rights of the parties acquired prior to the time when particulars of such charge shall be actually registered."

There has been some difference of judicial opinion as to the meaning of the last sentence of the order and in particular whether provision should be made for the protection of unsecured creditors. It was suggested by Buckley, J., in *Re Cardiff Workmen's Cottage Co.* [1906] 2 Ch. 627, that provision ought to be inserted at any rate in certain cases for their protection. His reason for making such suggestion was that persons may have lent the company money on the strength of the fact that there were no secured creditors registered, who would have priority to them. In *Re M.I.G. Trust, Ltd.* [1933] Ch. 542, at p. 570, Romer, L.J., pointed out that the learned judge had not fully considered the implications of his suggestion. Romer, L.J., pointed out that if Buckley, J.'s suggestion was carried into effect, this would have the result of putting the secured creditor in a worse position than he would be in if he took (at the date when the order extending the time for registration was made) a new charge from the company, because by taking a new charge from the company he would at once obtain priority over all the existing unsecured creditors of the company, subject only to any question that might arise of undue preference. In *Re Kris Cruisers, Ltd., supra*, Vaisey, J., held that he was bound by the decision in *Re M.I.G. Trust, Ltd.*, and made particular reference to the judgment of Romer, L.J.

Thirdly, the evidence required to support such an application must fully set out the circumstances of the omission to register within the proper time or of the mis-statement to be rectified. It is not sufficient merely to state that the omission or mis-statement was "accidental" or "due to inadvertence." In *Re Kris Cruisers, Ltd.*, Vaisey, J., criticised the lack of evidence before him and gave a clear warning that he might on some future occasion find himself compelled to dismiss an application which did not place before the court full details and particulars of the nature of the inadvertence and the excuses which were offered for the negligence or omission which the application sought to cure. Whether or not evidence of the solvency of the company should be included has been the subject of a measure of judicial controversy. In *Re M.I.G. Trust, Ltd.* [1933] Ch. 542, Romer, L.J., held that such evidence was unnecessary and irrelevant in so far as it dealt with the position of the company as regards its unsecured creditors and did not indicate that there was anybody who had obtained any interest in the property of the company. Romer, L.J., attributed its inclusion to the report in *Re Bootle Cold Storage and Ice Company* [1901] W.N. 54. In *Re L. H. Charles, supra*, on the other hand, Clauson, J., said that it was the practice of the court to scrutinise carefully the evidence in support of the application in order to satisfy itself that the company was solvent and that no winding up of the company was impending. In *Re Kris Cruisers, Ltd.*, Vaisey, J., took the view that s. 101 was a benevolent section in the sense that it gave the mortgagee or chargee a complete and unfettered opportunity for repentance and really to place him in the same position exactly as if he had been careful and not careless, diligent and not negligent. Vaisey, J., took the view that the company's solvency or insolvency was a matter to which he need pay no attention and that Clauson, J.'s judgment in *Re L. H. Charles, Ltd.*, was exceptional on the facts of that case and should be treated as such.

At this point it may be convenient to set out briefly the alterations made by the 1948 Act in the law relating to the registration of charges. These alterations can best be seen as set out in the Companies Act, 1947, s. 89. The alterations are as follows:—

(1) The registration of a charge on land no longer applies to and is deemed never to have applied to a charge for rent or any other periodical sum arising out of land.

(2) In the case of a charge created out of the United Kingdom comprising "solely" property situate outside the

United Kingdom a copy instead of the original of the instrument of charge may be delivered for registration. In addition, the word " solely " is now omitted.

(3) The registrar may, on evidence that part of the property comprised in a registered charge has been released from the charge or has ceased to form part of the company's property, enter on the register a memorandum to that effect. The registrar may also enter a memorandum of part payment of the debt secured by the registered charge.

(4) Lastly, the registrar need no longer keep a chronological register of registered charges.

N. P. M. E.

Taxation

SPECIAL CONTRIBUTION AND INCOME FROM PROPERTY

(*References are to the Finance Act*, 1948)

THE special contribution may be attracted if, in the year 1947–48, an individual taxpayer's total income, as ascertained for the purpose of the contribution, exceeded £2,000, and it is calculated on the amount by which his aggregate investment income exceeded £250. It is the purpose of this article to examine how income from property (in the sense of land and buildings) is affected by these provisions.

The general rule is that income is ascertained as for sur-tax (s. 48), and accordingly any net Sched. A, excess rents, or Sched. B assessments, included in an individual's total income for sur-tax, will usually form part of, and any maintenance claim or other allowance relating to the property will be deducted from, the total income of the individual for the purpose of the contribution. Schedule A and excess rents assessments will be classed as investment income, attracting the contribution (except in the one case where the beneficial occupation of property forms part of the emoluments of an employment, where the Sched. A assessment (or a part thereof if a rent lower than the net annual value is paid) ranks as earned income). Schedule B assessments sometimes rank as earned income and sometimes as unearned, but the distinction is immaterial, since all assessments under Sched. B (though included in total income) are disregarded in ascertaining aggregate investment income (s. 50 (4)) and so do not attract the contribution. This exclusion of Sched. B is no doubt for the reason that the capital value of the property is reflected by the Sched. A assessment, and the fortuitous addition of Sched. B in certain cases would unduly inflate the figure.

In the case of a beneficial occupation, that is to say, when property is occupied rent-free or at a rent below the net annual value, a part of the Sched. A assessment equal to the rent (if any) is treated for sur-tax purposes as forming part of the total income of the person entitled to the rent, and the balance (or the whole, if no rent is paid) is attributed to the occupier; and the position is the same for the purpose of the contribution, in calculating both total income and aggregate investment income, subject to what is said below as far as regards property occupied rent-free.

Special provision is made in s. 52 (2) for the purpose of the contribution relative to property occupied rent-free. It is provided that income from the occupation of property under a revocable licence not granted for valuable consideration is to be treated for the purpose of the contribution as income of the person entitled to occupy the property on the revocation of the licence, and not as income of any other person. The words of this provision referring to " income from *occupation* of property " might appear to relate to Sched. B rather than to Sched. A, for under the latter schedule income arises from the ownership of property; nevertheless it would be almost pointless to relate the provision solely to Sched. B, since assessments under that schedule affect total income only, and not aggregate investment income, and it cannot be doubted that it refers mainly to rent-free occupations under Sched. A.

It is evidently recognised, for the purpose of the contribution, that the sur-tax rule attributing to the occupier the Sched. A assessment of property occupied rent-free by a tenant at will or licensee is not just when it comes to imposing a capital tax, for the capital belongs to the owner and not to the occupier. The income is to be treated, for the purpose of the contribution, as that of the person entitled to occupy the property on the revocation of the licence, that is to say the landlord of the tenant at will (or the licensor of the bare licensee), whether freeholder or leaseholder. However, the operation of the provision is strictly circumscribed, and the limitations are examined in the succeeding paragraph.

The provision refers to a revocable licence not granted for valuable consideration. The obvious case of this is a tenant at will living rent-free. But the requirement that the licence is not granted for valuable consideration excludes from the provision many cases which would seem to be fit for inclusion on their merits. For instance, if a tenant at will has undertaken, in consideration of being allowed to occupy the property, to do repairs or to keep the property in proper condition—a very common kind of obligation—this is valuable consideration, and the result will be that the income will be deemed to be his for the purpose of the contribution, if he is paying no rent. It is true that this will often prove favourable to the taxpayers, for it more often happens that the owner is wealthy, while the occupier rent-free is not, but nevertheless the principle can hardly be regarded as satisfactory. A further instance of an apparent injustice is the case of a tenant having a lease for a term at a nominal rent or no rent at all, for which lease he had paid a substantial premium; the net annual value under Sched. A (reduced by rent paid, if any) would be part of his investment income attracting contribution, yet the capital value of his lease would be a great deal less than the figure of income would indicate. The case of a lessee of leasehold property held at a ground rent under a long lease which will shortly expire is particularly hard; the net annual value (less the ground rent) will attract the contribution in the case of the leaseholder, although his leasehold interest may be negligible in value or even a liability owing to dilapidations; on the other hand, the position of the ground landlord is favourable in all respects; he expects shortly to realise the fruits of capital appreciation, without any liability in respect of such capital profit to income tax, sur-tax or contribution (except in the unusual event of his being a dealer in ground rents); the only sum which he will include in his income for the purpose of the contribution is the relatively small ground rent, which is no reflection of the capital value of his asset. These cases are simply extreme instances of the fundamentally unsound basis of the contribution, namely, that it seeks to tax capital by reference to the income produced thereby, which may bear little relation to the true capital value.

Income from investments (including land) which falls to be taken into account as a receipt in computing, for tax purposes, the profits of a trade, profession or vocation, or which would so fall to be taken into account but for the fact that it is taxed at source, is not to be treated as investment income (s. 49 (2) (*a*)). An example of income from property which so escapes attracting the contribution is rents receivable by a builder in respect of houses built and let on ground leases by him as part of the carrying on of his trade.

Income arising to persons carrying on a trade, profession or vocation from property occupied and used by them for the purposes thereof is not to be treated as investment income (s. 49 (2) (*b*)). If part only of the property is so occupied and used, a due proportion of the income escapes. Thus, in the case of a solicitor who owns his office premises, the net annual value under Sched. A, though it forms part

of his total income, is not treated as investment income so as to attract the contribution.

Where an individual or his spouse has settled property on the National Trust, retaining for himself or herself, or his or her spouse, a life interest, the net annual value will form part of his or her total income both for sur-tax purposes and for the purpose of contribution, but such income is not to be treated as investment income and accordingly does not attract the contribution (s. 66). This provision is not so much a bonus to the life tenant, as to the National Trust, for had contribution been attracted, the amount would have fallen on the capital and not on the life tenant.

The amount of a maintenance claim made by an individual, in respect of the cost of maintenance, repairs, insurance and management of property, is a proper deduction from the amount of his Sched. A assessment (and any excess of the maintenance claim over the amount of the Sched. A assessment is, in the case of agricultural claims, a proper deduction from other income of the same year or agricultural income of succeeding years) and therefore operates in reduction of total income of the year. So far as it reduces the Sched. A assessment, it also reduces investment income for the purpose of the contribution, and, so far as any excess of the maintenance claim over the Sched. A assessment was set against agricultural investment income of the same year, it reduces that investment income for the purpose of the contribution (s. 51 (3)). During the passage of the Finance Bill through Parliament, it was represented that maintenance expenditure in the year 1947–48 had been in many cases heavier than the average of the preceding five years, on which the maintenance claim is based, since those five years were war years when expenditure was low. For this reason a provision was inserted in the Act (s. 62) under which an individual can, if he prefers, substitute for the maintenance claim for the year 1947–48, the actual cost of maintenance repairs, insurance and management for the year to 31st March, 1948, or such other date in the year 1947–48 as he may adopt with the consent of the Inspector of Taxes. In order to claim this relief, an application must be made to the Special Commissioners before the assessment to contribution becomes final.

An owner or tenant of agricultural or forestry land may, in the year 1947–48, have had a claim under s. 33 of the Income Tax Act, 1945, for an allowance of one-tenth of capital expenditure on the construction of farm-houses, farm or forestry buildings, cottages, fences or other works, and in that event the amount of such allowance, so far as it was deductible from agricultural investment income of that year, is a proper deduction in ascertaining aggregate investment income (s. 51 (3)). Normally the allowance would have been given against the Sched. A assessment of the agricultural land for that year, thus reducing liability to contribution; if that were not available (for instance, because it had been eliminated by the maintenance claim, or because the person incurring the expenditure was tenant at a rack rent and so not liable to bear the Sched. A tax), then it would have been allowed primarily against other agricultural and forestry income. Usually such agricultural or forestry income was earned income, such as farming profits, so that no benefit would be obtained in relation to the contribution if the capital expenditure allowance were set against that, but an example of agricultural or forestry income, other than Sched. A assessment, which would have been investment income is excess rents of agricultural or forestry land, and if there were any such, the liability to contribution would be reduced by setting the capital expenditure allowance against such excess rent.

C. N. B.

A Conveyancer's Diary

CONDITIONAL AGREEMENTS FOR SALE OF LAND

DOUBTS are still sometimes expressed regarding the effect of the phrase "Subject to the title being approved by the purchaser's solicitor," which is a not uncommon variant of the more comprehensive "Subject to contract," at least in home-made contracts for the sale of land. Does the phrase mean no more than that the right of the purchaser to investigate the title, which is in any case implied, is to be safeguarded? Or does the phrase import a true condition, with the result that an acceptance or an agreement *inter partes* incorporating this formula does not bind the parties until the condition has been fulfilled?

The latter is the view which is now generally accepted. There is a good deal of authority on the point, and the modern cases begin with *Hudson* v. *Buck* (1877), 7 Ch. D. 683, in which Fry, J., construed a memorandum containing a stipulation of the kind under consideration as a qualified agreement only. The ground for this decision is interesting: it is that a purchaser may very reasonably wish to submit to the approval or disapproval of a person he can trust a question which, in the absence of some such stipulation and in the event of a dispute arising between the parties, must almost inevitably become the subject of litigation, with all the expense which that involves. But that it is easier to provide hopefully for an alternative to litigation than to achieve this desirable end the history of this case itself shows, since in the action for specific performance launched by the vendor it became necessary to determine whether the purchaser's solicitors had been justified in withholding their approval of the title, and this question necessarily involved in some degree the question whether the vendor's title was in fact such as could properly be rejected by a purchaser.

The uncertainty which, to some extent, still attaches to the interpretation of this phrase originated in certain remarks made by Lord Cairns in *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311. This was a case in which negotiations for the sale of certain land were conducted over a considerable period of time and in which a number of letters passed either between the parties or between their legal advisers. One of the purchaser's letters appeared to accept an offer of sale "subject to the title being approved by our solicitor." The Court of Appeal (whose decision is reported at 8 Ch. D. 670) decided the case on these words, holding that a new term was thereby introduced which had not appeared in the vendor's original offer, and for this reason there was no concluded contract between the parties. It was, of course, an essential part of this decision that the words in question introduced a genuine stipulation and were not intended merely to safeguard the purchaser's normal right to investigate his vendor's title.

The House of Lords upheld this decision but on another and wider ground, viz., that the correspondence between the parties had throughout been subject to certain verbal reservations as to the manner of paying the purchase price, and that a consideration upon the whole of what passed between the parties showed that the purchaser (the plaintiff in the specific performance action which gave rise to the reported proceedings) had not established a complete and concluded contract between the parties. But in his speech Lord Cairns expressed doubt whether the opinion of the Court of Appeal on the effect of the qualifying phrase contained in the acceptance, or purported acceptance, could be maintained; and he expressed his own view that the words meant nothing more than a guard against its being supposed that the title was to be accepted without investigation. He found difficulty in thinking that any person could have intended a term of this kind to operate as a genuine condition; on that footing the vendor would be bound by the agreement while the purchaser would remain virtually free, since he could, by appointing any solicitor he chose or by changing his solicitor, approve or disapprove the vendor's title from mere caprice.

Now these observations, having regard to the grounds on which the decision in this case was ultimately pronounced, are no more than *dictum*, and although the *dicta* of so eminent an equity lawyer in the normal way carry great weight there is a circumstance about these particular remarks which diminishes the authority they would otherwise possess. Neither the decision of the Court of Appeal in *Hussey* v. *Horne-Payne* nor that of Fry, J., in *Hudson* v. *Buck* went to the length of allowing a purchaser who had protected himself by inserting in the contract a stipulation referring the title to the approbation of his solicitor to act unreasonably in the reference: if the title is in fact rejected by the purchaser's solicitor in such a case both the purchaser and the solicitor must be prepared to show that they have acted reasonably and without *mala fides*. This is clear from the decisions referred to above, and the necessity of complete *bona fides* has been stressed more recently in *Curtis Moffat, Ltd.* v. *Wheeler* [1929] 2 Ch. 224, and *Caney* v. *Leith* (1937), 81 Sol. J. 357.

Both these cases are authorities for the view that a stipulation rendering a contract subject to the vendor's title being approved by the purchaser's solicitor makes the contract conditional; and in both these cases the Court of Appeal decision in *Hussey's* case was regarded as binding upon a court of first instance. As a result it may, I think, be stated with confidence that Lord Cairns' doubts on the precise effect of a stipulation referring a title to the approval of the purchaser's solicitor will not be shared by any of the courts of inferior jurisdiction in this country to-day, and that to reverse the current trend a litigant would have to be prepared to take his chance on an appeal to the House of Lords. On such a point as this the possibility is remote, and the somewhat uncertain approach of some text-book writers to the problem with which this "Diary" is concerned is, in my opinion, unjustified.

"A B C"

Landlord and Tenant Notebook

WITHDRAWAL AND "WAIVER" OF NOTICE TO QUIT

It is a pity that more attention has not been paid than has been the case to the following statements of the law to be found in the judgments of Lush, J., and Shearman, J., respectively, in *Davies* v. *Bristow*; *Penrhos College* v. *Butler* [1920] 3 K.B. 428: (i) "The expression 'waiver of a notice to quit,' though convenient as a description of the position where both landlord and tenant agree that a notice which has expired shall be treated as inoperative, is an inaccurate expression, and if one attempts to found a proposition of law upon it it is likely to lead one astray." (ii) "A notice to quit can be withdrawn at any time before the date fixed for the determination of the tenancy. But after the time has expired the lease is at an end and a landlord can no more waive his notice to quit than he can waive the effluxion of time."

Though neither *Tayleur* v. *Wildin* (1868), L.R. 3 Ex. 303, nor *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495 (C.A.), was mentioned in the course of the above case, which showed that the landlord of protected premises could safely accept "rent" from a "tenant" after expiration of a notice to quit, those two earlier decisions in fact indicate the distinction. In *Tayleur* v. *Wildin* a tenant held over after expiration of a notice to quit, and then failed to pay certain rent; the landlord sued the defendant who had guaranteed rent under the original tenancy. It was held that the continuance in possession evidenced a new tenancy, for either party could have insisted on the notice to quit determining the old one, and the defendant was not liable. But in *Holme* v. *Brunskill* a notice to quit was withdrawn by consent during its currency and a variation in the terms of the tenancy was then negotiated, and it was held that the surety for the performance of the tenant's covenants was not released. (The withdrawal and negotiations before expiration appear to have been the vital distinction, though that such withdrawal and negotiation, describing a notice to quit as "cancelled," can result in the grant of a new tenancy rather than the continuance of an old one was demonstrated by *Freeman* v. *Evans* [1922] 1 Ch. 36 (C.A.).)

Now, the recent case of *Clarke* v. *Grant* (1949), 93 Sol. J. 249 (C.A.), has given us new authority on what will constitute an agreement for a new tenancy. The plaintiff had let the defendants a house by an agreement under which rent was payable monthly in advance. After he had given them notice to quit (and presumably after that notice had expired) they paid his agent a month's rent which the agent thought to be due for the last month of the tenancy. The deputy county court judge held that the effect was to create a new tenancy. The Court of Appeal went right back to *Doe d. Cheny* v. *Batten* (1775), 1 Cowp. 243, in which Lord Mansfield, C.J., Ashurst, J., and others, laid it down that acceptance of rent in such circumstances was evidence, but not conclusive evidence, of "waiver" of the notice; *quo animo* should be left to the jury. It might be that the landlord, actuated by lenity, had accepted the money as half the "double rent" to which he would be entitled under the Distress for Rent Act, 1737. The judgment in *Clarke* v. *Grant* (delivered by Lord Goddard, C.J.) went on to say that it was impossible to find that the parties had intended that there should be a new tenancy; the landlord had all the time been desiring possession, and that was why he had given notice to quit. The mistake of the agent could not evidence agreement to a new tenancy.

Accepting the reasoning, I would suggest that *Doe d. Cheny* v. *Batten* was not really analogous. A difference that might well be considered essential was that in the older case the court, on the occasion of the new trial, appears to have thought (erroneously) that it was the tenant who had given notice to quit: there should, indeed, have been no question of the landlord having been double-rent conscious when he accepted the payment, the statute not applying when he has given the notice. (While, if the court was thinking of double value under the Landlord and Tenant Act, 1730, notice would be essential.) In the recent case the judgment itself, as mentioned, makes the point that it was the landlord who wanted to terminate the tenancy. It is true that Kelly, C.B., emphasised, in his judgment in *Tayleur* v. *Wildin*, that whether a notice to quit was given by the landlord or by the tenant the party to whom it is given is entitled to insist on it and it cannot be withdrawn without the consent of both. But, in weighing evidence designed to prove such consent, one would have thought that the consideration "who gave the notice" might be an important factor. While no law can prevent either of two parties from changing his mind, the presumption is, surely, against such a change.

An instance of the effect of payment of rent to an agent ignorant of the determination was, in fact, afforded by *Doe d. Ash* v. *Calvert* (1810), 2 Camp. 387, which decided that the acceptance, in ignorance, by the landlord's bankers of "rent" in respect of a period after the expiration of a notice to quit (given by the landlord) did not create a new tenancy.

The statement of the law made by Shearman, J., in *Davies* v. *Bristow* is open to the criticism that it is incomplete and might lead people to think that a "withdrawal" of a notice to quit could be effected unilaterally. The other authorities make it clear that such is not the case. The recently repealed Agricultural Holdings Act, 1923, contained a provision showing that Parliament had not fallen into this error: a proviso to s. 12 (1), which conferred the right to compensation for disturbance, said that compensation should not be payable "where the landlord has made to the tenant an offer in writing to withdraw the notice to quit and the tenant has unreasonably refused or failed to accept the offer." It is easy to imagine that acceptance might have given rise to nice questions where sureties or other third parties were likely to be affected, as in *Tayleur* v. *Wildin*

and the other cases mentioned earlier in this article; but it seems that the only authority produced was that of *Re Perrett and Bennett-Stanford's Arbitration* [1922] 2 K.B. 592 (C.A.), which decided that an offer to continue at a specified increased rent was not an offer to withdraw a notice to quit. The court avoided committing itself on the question whether the withdrawal of a notice invariably created a new tenancy, being content to indicate that what was contemplated was that landlord and tenant must, should the offer be accepted, be placed in the same position as that in which they would have stood towards one another if the original notice had never been given. But whether a surety would continue liable because this was done before the notice to quit expired was a matter touched upon only.

R. B.

HERE AND THERE

A SAD FAREWELL

THERE are some departings that strike a deeper chill than others in the heart. Such is the death of Mr. Reginald Hine, who "while the balance of his mind was disturbed"—so it was found at the inquest—flung himself in front of a train at Hitchin Station. He was sixty-five years old. In Hertfordshire he had long been well known not only as a solicitor but as a local historian and man of letters, the author of a dozen published works, but since 1945 he had acquired a fame far beyond the bounds of his county and the limits of his profession with a remarkable book, "The Confessions of an Uncommon Attorney." That it will remain a classic of legal literature one cannot doubt and it is unlikely that it will be forgotten in the wider world of letters. It was intensely revealing and the personality of the author was impressed on every page, a personality fastidious, cultivated and intelligent, a mind full of eager curiosity for men and things, their individualities and their oddities, a soul sensitive to the touch of beauty in a line of poetry or the atmosphere of a landscape. It is on a personal note that the book opens, for he dedicates it "in the first place to myself, having written it for my own pleasure; in the second place to my brother solicitors, for their 'use and enjoyment' and in self-defence of our much maligned profession." Next came the intelligent reader and last the general reader.

THE SOLICITOR'S LIFE

OF the practice of his profession he has much to say that is too little said: "The law, precisely because it is not an exact science, is a most exacting profession, and you will find its practitioners driven to do other things—preferably illegal—to preserve their health of mind. For my own part, I saw, before I was out of my articles, that I should have to lead a double life, and accordingly I apprenticed myself to the Muses." So in him there grew up, beside the lawyer, a second self—the man of letters and the explorer of the recondite byways in the history of Hitchin and of every nook and cranny in the county, the indefatigable discoverer of the curious, the entertaining and the picturesque, the delver into out-of-the-way bookshops and country house libraries and the unraveller of the ancient secrets, lost in the stored-up boxes of Messrs. Hawkins & Co., of Hitchin, whose practice in the law goes back to 1591. In their offices, in an old Jacobean house in Portmill Lane, he passed thirty-five years, first under articles and then as assistant solicitor and he planned some day to publish a history of the firm. When he left it he continued to practise in Hitchin in partnership with Mr. Reginald Hartley. He was no mere lawyer but he felt strongly for the honour of his profession: "One grieves when the character of good men is taken away; but who grieves when solicitors are told they have no character to be taken away? Often I wonder why our profession is so much abused . . . I may be a prejudiced party, but I have known hundreds of practitioners, who were large-hearted, open-handed, fair-minded men; tolerant, perhaps too tolerant, of human frailty; quickened in their own sympathies by being called upon to advise all sorts and conditions of men in all sorts and conditions of trouble." A distinction, indeed, he drew between the "old-fashioned, long-established, county conveyancing firm . . . the dedicated servant of an ancient and honourable tradition" and "the common-law man, land-jobbing, jerry-building, company promoting, debt collecting, writ serving, time serving," but he added: "Were we to admit only high-minded and well-born people into our offices we should soon have to put up our shutters. It is all very well to abuse solicitors but what about those who solicit their advice? It is their mud, some of it, that sticks to us."

THE SHADOW

EVEN over this book, a record of a life so fully lived, there lay a conscious shadow. He told of the time when "as happens so frequently to the sad and sedentary race of solicitors in their forties, things began to go wrong . . . The doctors have no word for it. It cannot be diagnosed in their trying, technical terms. But we who suffer recall the first symptoms of this lingering death: there comes a dry-rot creeping through our House of Life: a desiccation of desires; a hardening of the arteries of the soul . . . When I resorted to doctors, they spoke learnedly of alopecia and neurasthenia but could do nothing for either. If I would be so unwise as to live beyond my income of vital energy I must expect to be in difficulties. Clearly the strain of leading a double life, the accumulation of office worries and the burden of clients' woes, had worn me down." The record of his sufferings, both waking and dreaming, is all the more moving in that his scholarly detachment enabled him to set them in a perspective of history and literature, while his sense of fun could lighten the darkness with a good story. His work he ended on a note of peace, for its composition was "finished in the Church of St. Nicholas at Minsden on All Hallows Eve, 1943." Minsden is the ruined chapel in a field near the town, which he held by lease from the vicars of Hitchin for the term of his natural life and where he wished his ashes to be laid to rest. In 1927 he had it cleared of fallen trees and tangled undergrowth, 15 feet high. There he found healing, consolation and repose where the very air, he said, "is tremulous with that faint susurrus—call it the undersong of earth, the music of the spheres, the sigh of departed time, or what you will, which only the more finely attuned spirits overhear." If ever Death, "the silent messenger, could appear amiable and lovely, it would be in such a place as this. For to sink down into this cool quietness of trees, to be softly surrounded with gleaming fantasies of foliage, to dream the last dreams in this house of wild flowers, bright-hearted birds, and those sweet-minded things which live where silence is, this would be not to die but to pass deliciously from peace to peace." Here let his spirit rest in peace.

RICHARD ROE.

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NOTES OF CASES

COURT OF APPEAL

WORKMEN'S COMPENSATION: SELF-INFLICTED INJURY

Saker *v.* South Suburban Co-operative Society, Ltd.

Bucknill, Cohen and Denning, L.JJ. 8th March, 1949

Appeal from Croydon County Court.

The appellant, a workman employed by the respondents as a maintenance and boiler man, suffered from involutional melancholia causing occasional mental "black-outs." While at work on a winter's day he felt cold and ill, and went to the office of the employers' manager to get warm. His evidence was that he turned on the electric fire and sat down before it, warming his hands. He remembered nothing more until he came-to in hospital three days later. The evidence of cleaners was that he came into their room on the day in question with his fingers severely burnt, saying repeatedly, "he made me do it." The electric fire, which was screwed into the wall, must have been seized by the workman with great force as it had been wrenched right out. The county court judge accepted the evidence of the mental doctor who had been in charge of the workman that his disease was progressive and that his seizing of the fire was the kind of act which the disease might cause. The doctor explained the burning of the fingers as being due to a deliberate physical attempt to clutch the fire, though the workman was unconscious of it, and said that, owing to his mental state existing before the accident, he had acted when in a state of automatism.

On that evidence the county court judge held that, as the workman was conscious to the extent of carrying out his purpose of seizing the electric fire, his injury was self-inflicted and that he was accordingly not entitled to compensation.

COHEN, L.J., said that there was evidence on which the judge could hold as he did. He had correctly directed himself in law that there was no accident because the workman had deliberately seized the fire. It was immaterial that the intention to seize it had been formed owing to a deranged mind, and while the workman was in a state of automatism. *Wilson* v. *Chatterton* [1946] K.B. 360, was distinguishable, for the workman's death there was due both to his disease and to the abnormal state of the ground in the place where he was required in pursuance of his employment to be. Appeal dismissed.

APPEARANCES: *Beney*, K.C., and *Dare* (*W. H. Thompson*); *Paull*, K.C., and *Tyrie* (*Fred Hollis*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

HUSBAND AND WIFE: FOOTBALL-POOL WINNINGS

Hoddinott *v.* Hoddinott

Bucknill, Cohen and Denning, L.JJ.
18th March, 1949

Appeal from Deputy Judge Raglan Somerset, sitting at Newport, Mon., County Court.

The respondent made his wife a housekeeping allowance. The money which she managed to save out of that allowance was used to provide the stake money for football-pool competitions in which both husband and wife made forecasts. On one occasion their joint efforts at forecasting resulted in the husband's winning £138 7s. For convenience that sum was placed in a banking account on which both were entitled to draw. Sundry drawings included a payment of £17 for hire-purchase of furniture. The balance of £100 in the account was later used for the same purpose. Matrimonial disputes eventually developed, and the wife applied to the county court, under s. 17 of the Married Women's Property Act, 1882, claiming delivery of the furniture of which the husband was in possession. The deputy judge dismissed the application, and the wife appealed.

BUCKNILL, L.J.—COHEN, L.J., agreeing—said that the housekeeping money belonged to the husband, in trust for whom the wife held it. If he invested part of it in football-pool competitions, the winnings were also his in the absence of any contract providing otherwise. On the principle laid down by Atkin, L.J., in *Balfour* v. *Balfour* [1919] 2 K.B. 571, at p. 579, the arrangement between the husband and the wife was an ordinary domestic one on which no action could be based. The wife's application must accordingly fail.

COHEN, L.J., said that a placing by a husband of money in a bank account in the joint names of himself and his wife raised a presumption of a gift to her of half of it; but that presumption was readily, as here, rebuttable. A right in the wife, because of the exercise by her of skill, to share in the proceeds of a stake made out of the husband's money had no foundation in law, was entirely without precedent, and was inconsistent with the principle enunciated by Atkin, L.J., in *Balfour* v. *Balfour*, *supra*.

DENNING, L.J., dissenting, said that the prize money was properly regarded as the proceeds of the spouses' combined skill in forecasting. The stake money was entirely subsidiary to the exercise of skill in forecasting. As the husband and wife had jointly embarked on the venture of entering football-pool competitions, the proceeds of the venture belonged to them jointly. If, on the other hand, the prize money was more properly regarded as the proceeds of an investment made out of the savings on the housekeeping allowance, then (whether or not—which *quaere*—the savings in equity belonged to the spouses jointly because due to the wife's good housekeeping) when they made an investment of the savings and nothing was said as to title to it, the title would depend on the nature of the investment made or the property bought. If the money were used to buy furniture, which was obviously intended as a continuing provision for their future joint benefit, the furniture should be presumed to belong to them jointly.

APPEARANCES: *Parnall* (*Collyer-Bristow & Co.*, for *D. Granville West*, Newport, Mon.); *A. A. Warren* (*Gibson & Weldon*, for *Everett & Tomlin*, Pontypool).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DESERTION: REFUSAL TO RESUME COHABITATION

Everitt *v.* Everitt

Lord Merriman, P., and Bucknill and Cohen, L.JJ.
31st March, 1949

Appeal from Mr. Commissioner Blanco White.

During the first months of his marriage the respondent husband pursued his association with a woman with whom he had had sexual relations before his marriage. Within six months of the marriage he deserted the appellant, his wife, and went to live in the house of the other woman, the wife thus having reasonable grounds for believing that he had resumed and intended to continue his old association, which would now be adulterous. Two years later the husband expressed the desire to resume cohabitation, stating that the woman had married a Belgian and left the country and that he had never committed adultery with her since the marriage because her association with the Belgian had already begun when he went to live in her house. The wife refused to have the husband back, but he contrived to instal himself in her flat, and lived in it for four months until she left. On her petition for divorce on the ground of desertion, the husband swore that during the four months they lived as man and wife, whereas the wife's evidence was that they lived an entirely separate existence in the flat. The commissioner did not decide that question because he held that the wife was not justified in refusing to resume cohabitation since the husband, by returning in changed circumstances—as his association with the other woman was clearly at an end—had terminated his state of desertion. The wife appealed.

LORD MERRIMAN, P.—BUCKNILL and COHEN, L.JJ., agreeing—said that, as the husband had by his conduct given his wife reasonable ground for believing him guilty of adultery, which she had not condoned, her refusal to resume cohabitation when the suspected adultery was clearly at an end could not have the effect of terminating the husband's desertion. *Lodge* v. *Lodge* (1890), 15 P.D. 159, on which alone the commissioner's decision could be justified, was wrongly decided, as had been stated by the Divisional Court in *Volp* v. *Volp* (1940), not reported. *Glenister* v. *Glenister* [1945] P. 30 showed that if, on the other hand, the commissioner's judgment meant that he dismissed the petition because of his finding that, at the date of his judgment, he was not satisfied that the husband had committed adultery, though the wife had until that date had reasonable ground for believing that he had committed it, that decision also was wrong. For, while his finding was conclusive once made, it could not operate retrospectively to destroy the reasonableness of the wife's belief. The petition must be dismissed, however, because they (their lordships) found as a fact that cohabitation had been resumed during the four-month period of the husband's residence in the wife's flat. Appeal dismissed.

APPEARANCES: *Trevor Reeve* (*J. C. Hodgson*, Law Society Services Divorce Department); *Constance Colwill* (*Musson & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

FALL OF TREE ON MOTOR-CAR: LANDOWNERS' LIABILITY

Caminer and Another *v.* Northern & London Investment Trust, Limited

Tucker, Asquith and Singleton, L.JJ. 12th April, 1949

Appeal from Lord Goddard, C.J. (92 SOL. J. 720).

While the plaintiffs were driving in their motor car along a road in St. John's Wood, an elm tree on the defendants' land fell on the car, inflicting on them injuries in respect of which they brought this action. A strong, gusty wind was blowing. The tree was 120 to 130 years old and had for some time been affected with butt rot, a disease which there was nothing in the tree before the fall to indicate. It had a 35-feet crown, not having been trimmed or lopped for many years. Lord Goddard, C.J., found that the fall was due to the wind, the disease and the large crown, and held that it was a reasonable and proper precaution for the defendants to top or pollard their elm trees as an ordinary incident of good estate management, but that they did not realise their duty, so that the plaintiffs were entitled to the agreed damages of £550 and £850, respectively. The defendants appealed.

TUCKER, L.J.—ASQUITH and SINGLETON, L.JJ., agreeing—said that there could be no doubt since *Noble* v. *Harrison* [1926] 2 K.B. 332 that, whether the claim was based on negligence or on nuisance, the plaintiff in such a case must establish either that the defendant knew of the danger or that he ought to have known of it. There were many things the doing of which might be in accordance with good estate management, but the failure to perform which did not amount to negligence. The defendants here did not know of the existence of the danger, and the only question was whether they had omitted to take some step which a reasonable landowner would have taken for the protection of the public and which would have prevented the accident. It might be wise and in accordance with good estate management to lop elms every five or seven years, but the evidence did not establish that elms of such age normally became dangerous after seven years without lopping. The real cause of the accident was the presence of elm butt rot, which disease had taken an unusual course with the result that there was nothing to indicate its presence to a layman or expert. The defendants were absolved from responsibility in that respect, and the evidence was insufficient to establish that their conduct had fallen short of the standard to be expected from a reasonable landowner of property adjoining a public highway. Appeal allowed. Leave to appeal to the House of Lords.

APPEARANCES: *Marven Everett* (*Barlow, Lyde & Gilbert*); *Fox-Andrews*, K.C., and *Rees-Davies* (*G. Howard & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at Law.]

CHANCERY DIVISION

GIFTS BY CHEQUE: WHETHER WITHIN THREE YEARS OF DEATH

***In re* Owen, deceased; Owen *v.* Commissioners of Inland Revenue**

Romer, J. 31st March, 1949

Adjourned summons.

The question raised was whether certain gifts made by the testator, Mr. Humphrey Owen, were made more than three years before his death, so as not to be capable of aggregation for the purposes of estate duty as property passing on his death. In March, 1941, the testator instructed his stockbroker to sell certain stocks and shares belonging to him and out of the proceeds to pay £3,000 into his accounts at his bank, and divide the balance among certain relations. The proceeds of the sale amounted to £17,083 18s., which were paid to the testator who, after paying £3,000 into his current and deposit accounts, drew cheques, one of £7,041 payable to his sister, Mrs. Kendrick Jones, and three of £2,347 payable respectively to his nieces, Kathleen Hughes and Dorothy Hughes, and his nephew, T. L. Hughes. These cheques were sent to the donees on 22nd May, 1941. Dorothy Hughes paid her cheque into the bank and it was cleared on 26th May, 1941. The other three cheques paid to relatives were paid in and cleared on 4th and 5th June and 2nd July, 1941, respectively. The testator died on 1st June, 1944. It was contended that these gifts were all effective before 1st June, 1941, and that they were drawn subject to a declaration of trust in favour of the recipients, which was irrevocable.

ROMER, J., said he was quite unable on the facts to accept that view of the matter. The proceeds of sale were paid to the testator and he drew the cheques. His lordship then referred to *Bromley* v. *Brunton* (1868), L.R. 6 Eq. 275. That case, however, was overruled by the Court of Appeal in *In re Swinburne* [1926] Ch. 38. There the cheque was presented without delay but the bank refused payment because the drawer's signature was doubted, and he died before anything further was done. It was held the gift was incomplete. A cheque was an instruction to the banker to pay money to the drawee of the cheque, but that was not a gift, merely a revocable authority to an agent. These three cheques did not create effective gifts until they had been paid in and cleared, and that was less than three years before the testator's death, therefore their amounts must be aggregated with his estate, and bear estate duty. He could not attribute to the testator intentions far removed from his mind in order to ante-date the effective date when those gifts became fully operative.

APPEARANCES: *W. L. Blease* (*Hatchett Jones & Co.*, for *S. R. Dew, Jones & Prothero*, Holyhead); *J. H. Stamp* (*Solicitor of Inland Revenue*).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

WAR DAMAGE: RECONSTRUCTION OF ROOF: SUBSTITUTE MATERIALS

Lidle *v.* War Damage Commission

Vaisey, J. 13th April, 1949

Appeal from a determination of the War Damage Commission.

The appellant, J. F. Lidle, was the owner of a house at Sydenham which, in February, 1941, sustained considerable damage to the roof by falling missiles. In 1944 the local authority, in exercise of their statutory powers, stripped the roof, which had been made of pantiles, and replaced it with a roof of corrugated asbestos sheeting. The cost of this work was £34 16s., which the Commission awarded. The cost of reinstating the roof with pantiles or Broseley tiles would be £61 8s. 3d. The appellant claimed that he was entitled to have the house re-roofed in the same way as it had been before the damage occurred. He further complained that the asbestos roof leaked. In 1946 a valley gutter on the roof was found to leak but was repaired. The Commission contended that it was a reasonable substitute for pantiles, which were not obtainable in 1944. (*Cur. adv. vult.*)

VAISEY, J., said he thought the questions were really questions of fact, though disguised as questions of law. The amount in dispute was small, but the appellant had other houses in the neighbourhood as to which similar questions might arise and the Commission regarded the case as being of importance. The matter turned on s. 8 (2) of the War Damage Act, 1943, which his lordship read. That section contained expressions which had no technical meaning and could only be made intelligible in the light of common sense. The problem must be faced as a particular problem in each case, and not as a matter of general principle. If a roof had to be replaced any recognised roofing material suitable for the purpose might be used without any departure from the original form of the building. To hold that blue slates were suitable for the roof of a house in a row of houses all roofed with red tiles, or that bright new tiles could be used for the high-pitched roof of a mediæval church would be wrong. Here the respondents took the view that an asbestos roof satisfied the test in the present case, and he would not say that they were wrong. A hard and fast rule was absolutely out of the question. The summons would be dismissed with costs.

APPEARANCES: *E. Montagu*, K.C., and *Michael Hoare* (*Thompson, Quarrell & Megaw*); *Michael Rowe*, K.C., and *H. O. Danckwerts* (*Treasury Solicitor*).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

BREACH OF PROMISE: MEASURE OF DAMAGES

Kremezi *v.* Ridgeway

Hilbery, J. 23rd February, 1949

Action with a common jury.

The plaintiff was a Greek woman, whom the defendant, an Englishman, promised to marry. The promise was made in Greece, was renewed in England, and was broken. During the hearing of the plaintiff's action for breach of promise, liability was admitted. The measure of damages depended on whether the broken contract of marriage was governed by Greek or by English law, which question was argued before the judge summed up.

HILBERY, J., giving judgment on that question, said that a contract, clearly on the first occasion made in Greece, was subsequently made solemnly over again in England with the

intention that the new contract then made should be in substitution for any previous contract between the parties. The contract made in England was the exchange between the plaintiff and the defendant of mutual promises of marriage, the mutuality of the promises constituting the consideration which was essential. The defendant was born and domiciled in England. It was his intention to live here if the marriage took place. It was the plaintiff's intention to adopt his home and people. No doubt the marriage itself was to take place in Athens, and to that extent the contract was to be performed in Greece and not in England. In those circumstances, according to the way in which English courts applied private international law, if Greek law were applicable to the contract the damages were limited to the reasonable sum expended by the woman in connection with the marriage. If, on the other hand, English law applied, damages were at large, an exception from the ordinary case of contract. In his (his lordship's) opinion, the guiding principle was still to be found in *Hansen* v. *Dixon* (1906), 23 T.L.R. 56. Here, it was true, the ceremony was intended to take place in Greece, but every other element in the case pointed to the intention of the parties as having been that the contract, made in England by the proposal of an Englishman to this Greek girl who had come to him here and wished to become his English wife, should be governed by English law, and he (his lordship) so held. Accordingly, he would direct the jury that the contract was governed by English law.

The jury returned a verdict for the plaintiff for £10,500 damages.

APPEARANCES: *Scott-Henderson*, K.C., and *Molony* (*Webb, Justice & Co.*); *Fearnley-Whittingstall* and *Godfrey Carter* (*Moon, Gilks & Moon*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PRACTICE NOTE

COSTS: COUNTY CASE TRIED IN LONDON

Hibbard *v.* Minister of Agriculture and Fisheries

Lord Goddard, C.J. 24th February, 1949

In an action tried by Lord Goddard, C.J., with a common jury, the plaintiff, who was employed by the East Sussex War Agricultural Executive Committee, claimed damages against the defendant Minister for injuries which he sustained as the result of being attacked by a bull, the property of the defendants, of which he was in charge at a farm in Sussex. The plaintiff alleged that his injuries were due to the failure of the defendants to provide proper buildings and appliances for the care of a bull which was known to be dangerous. The defendants denied that the bull was a dangerous one and pleaded that the danger to which the plaintiff was exposed was one incidental to his employment. The jury awarded the plaintiff £2,000 damages, which were reduced, by consent, to £1,000, with £229 special damages.

LORD GODDARD, C.J., said that all the witnesses were Sussex people and the costs of the action must be at least 25 per cent. more than would have been the case if it had been tried on circuit. He would direct the taxing master that, in taxing the costs, he must have regard to what the expenses of witnesses, and so forth, would have been if the case had been tried at Lewes, and allow no more costs than would have been allowed if the case had been heard there. He trusted that notice would be taken of what he had said regarding the place of trial.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

LANDLORD AND TENANT: EXHIBITION OF NAMEPLATE

Frederick Berry, Ltd. *v.* Royal Bank of Scotland

Lord Goddard, C.J. 24th February, 1949

Action.

The plaintiffs were jewellers and dealers in antiques, to whom the defendants had let the third floor of a building in Bond Street, London. The defendants themselves occupied the ground floor. The lease contained a covenant by the plaintiffs not to hang out or exhibit any signboard or other advertisement on the third floor or at the main entrance of the premises without first obtaining the consent of the defendants, such consent not to be unreasonably withheld. The tenants claimed in this action a declaration that the defendants, who had refused their consent to the plaintiffs' exhibiting a nameplate on a pillar of the main entrance of the premises, were not entitled to do so.

LORD GODDARD, C.J., said that if a tenant took only an upper floor of a building and had no more than a right (as in the present case) to use the entrance hall for the purpose of approaching the premises demised, he must stipulate for the right to put a nameplate in the entrance hall. It had been argued that, by the covenant in the lease not to exhibit any signboard or other advertisement there without the defendants' consent, the plaintiffs had been granted that right subject to the defendants' power to object on reasonable grounds. He (his lordship) could not so construe the covenant. The question usually arose in relation to the right to assign or sub-let premises; but in such cases a tenant, apart from any restrictive covenant into which he had entered, could assign or sub-let the premises as he liked. Here it was conceded that unless there was at least an implied covenant by the defendants, the plaintiffs could have no right to put up the plate on the outside of the premises. There was not an implied covenant that the defendants would give their consent unless they had a reasonable ground for refusing it. The words in the covenant with regard to the withholding of consent would operate, and therefore a meaning could be given to them, if the plaintiffs desired to put up a notice or sign outside the third floor. In any event, he (his lordship) found as a fact that the defendants' consent could not be said to have been unreasonably withheld. He had taken the opportunity of seeing the premises for himself, and, as it was a fine day, had made careful observation of other shops, business premises and banks in the district. The question was not what other landlords might do; but it did appear that the defendants' practice (of not allowing nameplates on their entrance pillars) conformed to that of other banks in the West End. There was a small plate bearing the plaintiffs' name and description at the side of one pillar, doubtless mainly for the information of postmen, and a similar large plate in the lobby immediately inside the door, which was clearly visible from the other side of Bond Street. Witnesses had given evidence that they had failed to see those plates, but how passed his comprehension. It might be that, as the establishment for which they were looking was a jewellers, their astonishment at seeing a bank was so great as to deprive them momentarily of their vision. In the main entrance hall the most myopic of customers must have seen one of the plaintiffs' plates. The defendants had given the plaintiffs all the publicity which they could reasonably require on the ground floor. The action failed.

APPEARANCES: *Duveen* (*Forsyte, Kerman and Phillips*); *Glyn-Jones*, K.C., and *Teague* (*B. P. Webster*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

GOODS VEHICLES: OPERATING CENTRE

R. *v.* Goods Vehicles Licensing Authority for Metropolitan Traffic Area; *ex parte* B. E. Barrett, Ltd.

Lord Goddard, C.J., Humphreys and Birkett, JJ.
2nd March, 1949

Application for an order of mandamus.

The applicant company were holders of a public carrier's "A" licence in respect of certain goods vehicles. On 27th September, 1948, they applied under s. 58 (4) of the Transport Act, 1947, to the respondent authority to specify London Colney, a place just south of St. Albans, as their operating centre for the vehicles in place of Luton, as formerly. By s. 52 (1) of the Act of 1947 it became a condition of every "A" or "B" licence that, except by permission of the British Transport Commission, an authorised vehicle should not carry goods outside a radius of 25 miles from its operating centre. By s. 58 (3), on an application for an "A" or "B" licence, an applicant might ask the licensing authority to whom he was applying to specify a point in the authority's area which was to be treated as the operating centre of the company's vehicles. By s. 58 (4) a similar request might be made by a person holding an "A" or "B" licence at the date of the passing of the Act. The licensing authority, in giving his decision, observed that an application for a change of operating centre under s. 58 (3) or (4) was left by the Act entirely to the discretion of the licensing authority, against whose decision there was no appeal; and that similarly, under s. 52 (1), the grant or refusal of a permit to carry goods for reward outside a radial distance of 25 miles was a matter for the discretion of the British Transport Commission, against whose decision there was no appeal. Having considered the company's request to him to fix a notional operating centre at London Colney for the greater part of their fleet of vehicles so that they might be enabled to continue carrying the traffic on which they had been engaged for many years, the authority was of opinion that the company's representations should be presented to the Transport Commission on an application under s. 52 (1). He did not think that a person wanting to carry goods for reward beyond a radius of 25 miles from his operating centre should seek to achieve his object by an application to the licensing

authority to fix a notional operating centre under s. 58 (3) or (4). He was of opinion that to grant the application would have the effect of defeating the clear intention of the Act of 1947, and he therefore refused it. The company now applied for an order of mandamus directing him to rehear it.

LORD GODDARD, C.J.—HUMPHREYS and BIRKETT, JJ., agreeing—said that the real basis of the argument for the company was that applications under ss. 52 and 58 were alternative, and that the company could endeavour to achieve their object either by securing permission from the Transport Commission under s. 52 to operate over a greater radius from Luton than 25 miles, or from the licensing authority to move their operating centre in such a way that they could run farther than 25 miles from Luton in one direction, thus perhaps achieving the same result as by an application under s. 52 to the Commission. The two bodies, however, were not the same: a careful reading of the Act showed that the two sections were in truth concerned with two different things. "Operating centre" meant the centre from which vehicles were being operated. A company might apply to have their operating centre changed to the place where they did their trading, and that was the object of s. 58. The company's business was the carrying of goods manufactured in Luton, not in London Colney, where they had no customers, except, perhaps, one. The true operating centre of their vehicles was Luton and nowhere else. London Colney, though it might be a convenience to the applicants, would not be a true operating centre. It now appeared clear that the licensing authority here was deciding, after hearing the evidence, that the applicants were really asking him for permission to run more than 25 miles from their operating centre, and that he would not allow an application under s. 52 to be made under colour of an application under s. 58. Application dismissed.

APPEARANCES: *Sir David Maxwell Fyfe*, K.C., and *D. Karmel* (*Mawby, Barrie & Letts*); *Sir Frank Soskice*, K.C. (*Solicitor-General*), and *H. L. Parker* (licensing authority) (*Treasury Solicitor*); *Sir Valentine Holmes*, K.C., and *F. A. Stockdale* (Road Transport and Railway Executive) (*respective solicitors for the Railway and Road Transport Executives*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time:—

British Film Institute Bill [H.C.] [14th April.

To provide for the payment to the British Film Institute of grants out of moneys provided by Parliament.

Read Second Time:—

Housing (Scotland) Bill [H.C.] [13th April.

Read Third Time:—

Agricultural Wages (Scotland) Bill [H.L.] [13th April.

B. QUESTIONS

Mr. EDE stated that out of a total of 253 girls in custody, 52 were in Borstal Institutions as a result of their having absconded from approved schools. The number of girls at present in Borstal Institutions who had previously been committed to approved schools, other than absconders, was 64. [14th April.

Mr. EDE gave details of the cases of robbery with violence during each of the twelve months in 1948. The total number of cases was 1,101 and there were 404 arrests made. He was unable to state the number of cases in which death or injury had resulted. [14th April.

Professor SAVORY asked Mr. Ede what obligation there was on Irishmen, so long as Ireland was not a foreign state, to serve notice of their intention to remain British subjects. Mr. EDE replied that there was no obligation. It was, however, open to anyone to whom s. 2 (1) of the British Nationality Act, 1948, applied, to give notice in pursuance of that section that he wished to remain a British subject. Persons who were British subjects under other provisions of the law need not give the notice. Form E.3 was not prescribed by any statute, but it was provided for the convenience of those giving notice. After notice had been given the person's status thereafter was that of a British subject. There was no statutory requirement for keeping a register under the section referred to. [14th April.

In reply to a question by Sir WAVELL WAKEFIELD, Mr. EDE said he was aware of no grounds for the suggestion that electors had been disenfranchised through the failure of His Majesty's Stationery Office to deliver the necessary forms in time, and hence the question whether he would give financial aid to the disenfranchised electors to meet the costs of appealing to the county court under s. 70 of the Representation of the People Act, 1948, did not arise. [14th April.

Mr. EDE stated that the Report of the Gowers Committee was at present under consideration, but he could not make any statement as to whether the Government intended to adopt its recommendations. [14th April.

Mrs. MIDDLETON asked the Chancellor of the Exchequer at what point in the consideration by local authorities of schemes to acquire property within the area of declaratory orders the War Damage Commission remits to the owner of any property concerned or to the local authority the amount involved in the settlement of a converted value payment. Sir STAFFORD CRIPPS replied that the war-damage payment was not converted to a value payment until the service of a notice to treat or the making of an agreement for the purchase of the particular property under compulsory powers. Payment was made after the purchase had been completed. [14th April.

In reply to a question by Commander NOBLE as to the form of statement for signature put by inquiry officers of the Post Office to persons suspected of working wireless sets without a licence, Mr. PALING said no prepared form of statement was used. The person was cautioned, and if he was willing to make a statement the caution was written down and after he had signed it he was asked when he installed and last worked the apparatus. His answers and anything more which he might say were written down in the form of a statement which he was asked to read, correct if he so desired, and sign. [14th April.

STATUTORY INSTRUMENTS

National Insurance (Claims and Payments) Provisional Amendment Regulations, 1949. (S.I. 1949 No. 717.)

National Insurance (Maternity Benefit) Provisional Amendment Regulations, 1949. (S.I. 1949 No. 718.)

Election Laws (Adaptation) Order, 1949. (S.I. 1949 No. 719.)

This Order makes a number of amendments and adaptations to the Representation of the People Act, 1948. Among the matters affected are: electors' proxies, lists of persons guilty of corrupt and illegal practices in parliamentary elections, election expenses at local elections, and registration duties. Adaptations are made in the form of notice of parliamentary election, and of nomination paper for a parliamentary election, etc.

Rules of the Supreme Court (Criminal Proceedings) 1949. (S.I. 1949 No. 721 (L.6).)

These Rules replace Rules 13 and 13A of the Rules of the Supreme Court (Criminal Proceedings), 1938, and deal with application for bail, admission to bail, and recommittal. The Forms in the Appendix to the 1938 Rules are also replaced by the Forms set out in the Schedule to this Order.

Draft Prison Rules, 1949.

These Draft Rules, which will be made under powers conferred by s. 52 of the Criminal Justice Act, 1948, deal with the whole life of prisoners from reception to discharge. The purpose of training and treatment of prisoners is stated to be "to establish in them the will to lead a good and useful life on discharge, and to fit them to do so."

Import Duties (Drawback) (No. 6) Order, 1949. (S.I. 1949 No. 732.)

Inland Post Amendment (No. 2) Warrant, 1949. (S.I. 1949 No. 735.)

Control of Borrowing (Amendment of Exemption Provisions) Order, 1949. (S.I. 1949 No. 755.)

See *ante*, p. 272, as to this order.

PARLIAMENTARY PUBLICATIONS

Final Report of the Committee on County Court Procedure under the Chairmanship of Mr. Justice Jones, M.C. (Command Papers, Session 1948–49, No. 7668).

NON-PARLIAMENTARY PUBLICATIONS

Ministry of Town and Country Planning Circular, No. 71.

Section 82 of the Town and Country Planning Act, 1947, deals with the position as regards exemption from development charge of land held by local authorities "for the purposes of any of their functions as such." Section 92 of the Act enables the authority to apply to the Minister for a determination if it is in doubt as to whether s. 82 applies in any particular case. Section 83 of the Act deals with the question of development charge in the case of land held by local authorities for purposes of comprehensive development or redevelopment, and here again an application may be made to the Minister for a determination. The present circular sets out as far as possible the principles on which the Minister will act in making these determinations with a view to reducing the number of cases in which an actual determination by the Minister will be requested.

Memorandum on Juvenile Delinquency. (Joint publication of the Home Office and the Ministry of Education.)

This Memorandum arises out of the Conference on Juvenile Delinquency held on 2nd March of this year. The statistics which it gives show rises in convictions of juveniles of varying age groups of from 15 to 36 per cent. in 1948 above the figures for 1947. The Memorandum discusses the causes and possible remedies for this alarming state of affairs, and suggests periodical meetings of all local organisations concerned in the problem with a view to collating information and taking the necessary action. It concludes with a list of questions which such organisations might ask themselves with a view to improving their facilities.

OBITUARY

MR. J. W. S. CLOUGH

Mr. John William Sibly Clough, of the firm of Sibly & Clough, solicitors, of Bristol, died recently, aged 65. He was admitted in 1907.

MR. A. T. CUMMINGS

Mr. Arthur T. Cummings, a partner in the firm of Cummings, Marchant & Ashton, City solicitors, died on 24th March. Mr. Cummings, who was admitted in 1888, was a Past Master of the City Solicitors Company and had been Vestry Clerk of St. Mary Abchurch for twenty years.

SIR ALFRED T. DAVIES

Sir Alfred Thomas Davies, retired solicitor, of Brighton, died on 21st April, aged 88. Sir Alfred qualified as a solicitor in Aberystwyth in 1883, and practised in Liverpool until 1907.

MR. R. A. DAW

Mr. Richard Arthur Daw, senior partner in the firm of Daw and Sons, solicitors, of Exeter, died recently, aged 76. He was admitted in 1894.

MR. T. R. EVANS

Mr. Thomas Robert Evans, solicitor and Town Clerk of Holyhead, died on 12th April, aged 88. Mr. Evans, who was admitted in 1887, was a solicitor for sixty years and had been Town Clerk of Holyhead for almost fifty years.

MR. R. L. HINE

Mr. Reginald Leslie Hine, F.S.A., F.R.Hist.S., solicitor, of Hitchin, died on 14th April, aged 65. Mr. Hine was the author of "The History of Hitchin," "Hitchin Worthies" and of "Confessions of an Uncommon Attorney."

MR. F. JEWSON

Mr. Frank Jewson, senior partner in the firm of Cozens-Hardy and Jewson, solicitors, of Norwich, died on 27th March, aged 83. He was admitted in 1889.

MR. A. L. MUSTARD

Mr. Alexander Low Mustard, senior partner in the firm of Grigor & Young, of Elgin, died recently, aged 60.

MR. G. A. V. RUSSELL-ROBERTS

Mr. George Allan Villeneuve Russell-Roberts, retired solicitor of the Supreme Court, died on 20th April, in Switzerland, aged 74.

MR. H. THOMPSON

Mr. Harry Thompson, solicitor, of Nottingham, died on 21st April, aged 58. He was admitted in 1928.

MR. B. WILLIAMS

Mr. Benjamin Williams, who had been associated for over sixty years with the firm of Henry Thompson & Sons, solicitors, of Grantham, died recently, aged 88.

NOTES AND NEWS

Honours and Appointments

Mr. L. S. DUPLOCK, legal assistant to Chislehurst and Sidcup Council, has been appointed chief assistant solicitor to Beckenham Corporation, in succession to Mr. F. G. Sutherland. Mr. Duplock was admitted in 1933.

Mr. D. P. HARRISON, senior assistant solicitor to the Enfield Urban District Council, has been appointed Deputy Town Clerk of Weymouth. He was admitted in 1946.

Mr. K. B. STOTT, LL.B., assistant solicitor to Nelson (Lancs.) Corporation, has been appointed assistant solicitor in the Beckenham Town Clerk's Department.

Mr. WATCYN VAUGHAN WILLIAMS, solicitor, of Cardiff, has been appointed Secretary to the South-western Divisional Coal Board.

Personal Notes

Mr. Percy Close, clerk with the firm of Rickerby, Mellersh and Co., solicitors, of Cheltenham, for fifty-two years, is retiring.

Mr. J. L. Calderwood, solicitor, of Swindon, was elected chairman of the Wiltshire County Council at the recent annual meeting.

Mr. G. W. Webber, retired solicitor, of Bristol, recently celebrated his eighty-eighth birthday. Mr. Webber was admitted in 1887 and retired in 1945.

Memorial Service

A Memorial Service for the late Lord Uthwatt will be held in the Chapel of Lincoln's Inn on Thursday, 5th May, at 4.30 p.m.

Wills and Bequests

Mr. Percy Clarke, solicitor, of Worthing, left £12,087.

Mr. Guy Wentworth Stanley, retired solicitor, of Cambridge, left £58,894. Mr. Stanley left £300 on trust for the provision of "Horkey" festivals (an old East Anglian custom) at Longstowe Cambridge.

SOCIETIES

The Sixty-first Annual General Meeting of the MONMOUTHSHIRE INCORPORATED LAW SOCIETY was held at the Law Library, Newport, on 22nd April, when the Annual Report of the Council was presented.

Mr. S. M. T. Burpitt was elected President for the ensuing year, and Mr. R. Basset Spencer and Mr. F. Taynton Evans, Vice-Presidents; Mr. C. O. Lloyd, hon. treasurer; Mr. S. M .T. Burpitt, hon. librarian, and Mr. W. Pitt Lewis, hon. secretary.

The following were elected members of the Council: Messrs. F. H. Dauncey, J. Owen Davis, Joshua Dawson, D. W. Evans, E. I. P. Bowen, S. P. Gunn, Mostyn C. Llewellin, G. Roy Jenkins, Trevor C. Griffiths and G. L. B. Francis.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Breaking through of Party Wall: Town and Country Planning Act

Sir,—Referring to your article on p. 260 of your issue of 23rd April, you will be interested to know that we have put this matter to the test, and have obtained a ruling from a local authority that the breaking through of a party wall so as to unite two buildings for common purpose is not a development. We would like to add that we fully agree with the local authority concerned and, as you rightly say, there is nothing the Central Land Board can do about it.

HEXTALL, ERSKINE & MUDFORD.

London, S.W.1.

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